Supreme Court U.S.
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No. 10-618

IN THE

Supreme Court of the United States

CITY OF NEW YORK, et al.,

Petitioners,

v.

METROPOLITAN TAXICAB BOARD OF TRADE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Of Counsel

Francis F. Caputo
Susan Paulson
Adam Stolorow

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
LEONARD J. KOERNER*
100 Church Street
New York, New York 10007
(212) 788-1010 or 1362
lkoerner@law.nyc.gov

November 5, 2010

* *Counsel of Record*

Counsel for Petitioners

232624

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

By making the Energy Policy and Conservation Act the only statutory mechanism for establishing fuel economy standards, did Congress intend to preempt state and local governments from adopting incentive programs to promote the purchase of fuel-efficient vehicles?

LIST OF PARTIES

In the United States Court of Appeals the plaintiffs-appellees were the Metropolitan Taxicab Board of Trade; Midtown Car Leasing Corp.; Bath Cab Corp.; Ronart Leasing Corp., Geid Cab Corp.; Linden Maintenance Corp., and Ann Taxi Inc. The defendants-appellants were the City of New York, Michael R. Bloomberg, in his official capacity as Mayor of the City of New York; the New York City Taxicab and Limousine Commission ("TLC"); Matthew W. Daus, in his official capacity as Commissioner, Chair, and Chief Executive Officer of the TLC; Peter Schenkman, in his official capacity as Assistant Commissioner for Safety and Emissions of the TLC; and Andrew Salkin, in his official capacity as First Deputy Commissioner of the TLC.

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OPINION BELOW

The decision of the Second Circuit Court of Appeals is reported at 615 F.3d 152 (2d Cir. 2010) and is reprinted in the Appendix ("App.") at 1a-13a. The district court's decision is reported at 633 F. Supp. 2d 83 (S.D.N.Y. 2009), and is reprinted at App. 14a-65a.

BASIS FOR JURISDICTION

The Second Circuit Court of Appeals rendered its decision on July 27, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2010).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

49 U.S.C. § 32919 (2010) (Energy Policy and Conservation Act ("EPCA"))

> (a) General. When an average fuel economy standard prescribed under this chapter [49 USCS §§ 32901 et seq.] is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter [49 USCS §§ 32901 *et seq.*].

35 Rules of the City of New York § 1-78(a)(3) (2009)

> (ii) For a vehicle that is hacked up pursuant to section 3-03 of this title, excluding

> section 3-03(c)(10) of this title [i.e., excluding hybrid electric and clean diesel vehicles], the Standard Lease Cap shall be adjusted downward by $4 per shift ($28 per week) beginning on May 1, 2009, by $8 per shift ($56 per week) beginning on May 1, 2010, and by $12 per shift ($84 per week) beginning on May 1, 2011.

STATEMENT OF THE CASE

A. Regulatory Framework.

This litigation concerns the City of New York's proper exercise of its police powers to amend its taxicab lease rate regulations to promote the purchase of clean, fuel-efficient taxicabs.

1. The City of New York's Taxicab Regulations.

The City of New York ("the City") extensively regulated the operation of taxicabs for decades prior to the passage of the EPCA in 1975. New York City taxicab regulations have long restricted vehicle choices and equipment, with a consequent impact on the overall fuel economy of taxi fleets. In addition, the City has also long regulated the economic relationship between taxicab fleet owners and drivers, including the lease rates that fleet owners may charge for the use of their vehicles.

In December 2007, the City enacted rules that required new taxicabs, except those that are wheelchair accessible, put in service beginning on October 1, 2008, to achieve at least 25 City miles per gallon, and those

put in service beginning October 1, 2009, to achieve at least 30 City miles per gallon ("25/30 MPG Rules"). 35 Rules of the City of New York ("R.C.N.Y.") § 3.03(c)(10)-(11) (repealed 2009). The only vehicles that met the 25/30 MPG Rules contained hybrid or clean-diesel engines. The Metropolitan Taxicab Board of Trade ("MTBOT") successfully challenged the 25/30 MPG Rules in district court and the rules were enjoined. *See Metro. Taxicab Bd. of Trade v. City of New York*, 08-cv-7837 (PAC), 2008 U.S. Dist. LEXIS 94021 (S.D.N.Y. Oct. 31, 2008) (*MTBOT I*). The City responded by rescinding the 25/30 MPG Rules. Joint Appendix ("JA") at 502, *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152 (2d Cir. 2010) (No. 09-2901) (*MTBOT II*).

On March 26, 2009, the City enacted new regulations, 35 R.C.N.Y. § 1-78(a)(3) (the "Lease Cap Rules" or "Rules"), to create incentives for the purchase of hybrid electric and clean diesel taxicabs. The Rules permit owners of medallions used for hybrid electric taxicabs and clean diesel taxicabs to charge $3.00 per 12-hour shift more than the maximum allowable standard lease rates and limit owners of non-hybrid taxicabs, after a phase-in period of two years, to charging $12.00 per shift less than the maximum allowable lease rate, while leaving the lease rates for accessible vehicles unchanged. *See* 35 R.C.N.Y. § 1-78(a). The $3.00 per shift upward lease cap adjustment represents the additional cost to owners to purchase and modify a hybrid vehicle (compared to a non-hybrid vehicle), spread out over the three year life of the vehicle. *See* JA505. The $12.00 per shift downward lease cap adjustment represents an estimated $15.00 per shift average difference in fuel costs between a non-hybrid

and a hybrid vehicle ($15.00 offset from the $3.00 upward adjustment results in a $12.00 downward adjustment). *See* JA507. The $12.00 adjustment has the effect of placing 80 percent of the differential cost of fuel per shift between hybrids and non-hybrids on vehicle owners who lease out their vehicles (such as MTBOT), while also helping to equalize total per shift driver expenses as between drivers who lease hybrids and those who lease non-hybrid vehicles. *See* JA505-06, 519.

The City enacted these new rules in order to correct a structural problem with the standard vehicle lease arrangement that artificially insulates fleet owners from fuel costs and creates a disincentive for the purchase of hybrid vehicles. The previous regulatory scheme had for years required fleet owners to purchase large sedans and, more recently to purchase only Ford Crown Victorias. Even after the City permitted hybrid vehicles as an alternative, the leasing rules insulated fleet owners from the significant economic consequences of their decisions to continue purchasing Crown Victorias because drivers, rather than fleet owners, bear the cost of fuel. The new rules were intended to address the economic and environmental consequences that arose out of the existing lease rate structure. In amending the lease rates to differentiate between hybrid and non-hybrid vehicles, the City restructured the allocation of costs between taxicab fleet owners and taxicab drivers so that drivers would not bear the costs of the fleet owners' vehicle purchase decisions and so that fleet owners would have an incentive to purchase hybrid vehicles. These Rules neither set fuel economy standards nor interfere with federal regulation of the average fuel economy of automobile manufacturers such

that they would fall within the scope of the preemption provision in the EPCA.

2. The Energy Policy and Conservation Act.

Congress enacted the EPCA to address the energy crisis resulting from the 1973 Mideast oil embargo. *See* H.R. Rep. No. 94-340, at 1-3 (1975), as reprinted in 1975 U.S.C.C.A.N. 1762, 1763-65. The goals of the EPCA are to improve motor vehicle efficiency and to "decrease dependence on foreign [oil] imports, enhance national security, achieve the efficient utilization of scarce resources, and guarantee the availability of domestic energy supplies at prices consumers can afford." S. Rep. No. 94-516, at 117 (1975) (Conf. Rep.), as reprinted in 1975 U.S.C.C.A.N. 1956, 1957; *see also Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 305-06 (D. Vt. 2007). The United States Department of Transportation ("DOT") is charged with establishing federal fuel economy standards on a fleet-wide basis. *See* 49 U.S.C. §§ 32902(a), 32902(c). These average standards are known as "corporate average fuel economy" or "CAFE" standards. The CAFE standard is "a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year." *Id.* § 32901(a)(6). The Secretary of Transportation has delegated administration of the CAFE program to the National Highway Transportation and Safety Administration ("NHTSA"), an operating administration of DOT. *See* 49 C.F.R. §§ 1.50(f), 501.2(a)(8).

The EPCA contains an express preemption clause preempting states and localities from adopting or

enforcing laws or regulations related to fuel economy standards or average fuel economy standards. 49 U.S.C. § 32919(a). Pursuant to this preemption provision, Congress made the setting of fuel economy standards exclusively a federal concern. *Id.*

B. Proceedings Below.

In September 2008, Metropolitan Taxicab Board of Trade, et al. moved to enjoin the City's 25/30 MPG Rules, arguing that these rules were preempted by the EPCA and the Clean Air Act ("CAA"). On October 31, 2008, the District Court, Southern District of New York (Crotty, U.S.D.J.) found that the EPCA preempted the 25/30 MPG Rules because the rules, by their own language, clearly related to fuel economy standards by setting fuel economy standards for taxicabs. *See MTBOT I*, 2008 U.S. Dist. LEXIS 94021, at *27-28. On March 26, 2009, the City rescinded the 25/30 MPG Rules and enacted the challenged Lease Cap Rules. JA502.

On April 17, 2009, MTBOT filed an amended complaint in the district court alleging that the Lease Cap Rules are preempted by the EPCA and the CAA because the Rules are essentially a mandate to purchase vehicles with a certain MPG or emissions rating. *See* JA11. MTBOT also brought a motion for a preliminary injunction to enjoin the City's enforcement of the Rules. *See* JA18-19.

The district court held oral argument on MTBOT's motion on May 7, 2009, and then held an evidentiary hearing on May 20, 2009, to determine whether the economic effect of the Lease Cap Rules on fleet owners

would force them to purchase hybrid vehicles. *See* JA12-13. By Decision and Order, dated June 22, 2009, the District Court, Southern District of New York (Crotty, U.S.D.J.) found that the Lease Cap Rules are a *de facto* mandate requiring the plaintiffs to purchase hybrid vehicles and found such a mandate to be related to both fuel economy standards and the reduction of vehicle emissions, and thus sufficiently likely to be preempted under the EPCA and the CAA so as to warrant a preliminary injunction. App. 65a.

The United States Court of Appeals for the Second Circuit affirmed. App. 13a. The Court of Appeals limited its analysis of the scope of the EPCA's express preemption provision to the text of the statute. App. 8a-12a. The Court of Appeals explained that the "related to" language in the preemption provision is expansive and includes any law that contains a reference to the preempted subject mater or makes the existence of the preempted subject matter essential to the law's operation. App. 8a-9a. Applying this definition of "related to," the Court of Appeals concluded that the Rules "relate to" fuel economy standards because, in distinguishing between hybrid and non-hybrid vehicles, the Lease Cap Rules, in effect, rely on fuel economy, and on nothing else, as the criterion for determining the applicable lease cap. App. 9a-11a. The Court held that, because the Rules are based expressly on the fuel economy of a leased vehicle, they are preempted by the EPCA. App. 12a. The Court of Appeals did not reach the question of whether the preemption provision of the CAA would invalidate the City's new rules. App. 12a. Nor did the Court address the arguments set forth in the amicus brief filed by the United States.

REASONS FOR GRANTING THE PETITION

The Court of Appeals' decision has devastating and far-reaching effects on the ability of states and municipalities to exercise their historic police powers to promote the use of clean, fuel-efficient vehicles. The Court of Appeals held that the EPCA preempts the exercise of New York City's police power regulation of the taxicab industry whenever the regulations expressly rely on a distinction between hybrid and non-hybrid vehicles. By finding that, in the City's taxicab lease rate regulations, "'hybrid' is simply a proxy for 'greater fuel efficiency,'" the Court of Appeals concluded that the regulations are "related to" fuel economy standards and are thus preempted by the EPCA. The decision places at risk of preemption countless state and local laws that provide incentives for the purchase and use of hybrid and other fuel-efficient vehicles, incentives that do not impinge on Congress' intent to make the setting of fuel economy standards exclusively a federal concern.

The environmental and health benefits of "clean" vehicle use are beyond debate. Moreover, Congress has encouraged states to undertake their own conservation programs to reduce energy consumption and has specifically enacted laws supporting state and local incentives promoting the purchase of hybrid or fuel-efficient vehicles. Yet the decision of the Court of Appeals now imperils such state and local efforts.

The Court of Appeals' decision is wrong and fails to follow established precedents of this Court. The EPCA was intended to preempt state regulation of fuel economy standards so that automobile manufacturers

would not be required to comply with myriad differing standards. There is no evidence that Congress intended preemption of local taxicab regulations that may influence a fleet owner's decision to purchase a certain type of vehicle. The Court of Appeals' overbroad reading of the "related to" language in the EPCA preemption provision ignores this Court's practical interpretation of this phrase and results in the erroneous displacement of state law. Despite this Court's attempts to clarify the analysis of "related to" preemption language, the Court of Appeals' interpretation of the EPCA preemption provision conflicts with the framework of analysis employed by the Fourth, Sixth, and Ninth Circuit Courts of Appeals and demonstrates confusion as to the applicable standard, or a degree of non-adherence with this Court's jurisprudence that should not be tolerated by this Court. Accordingly, this Court should grant *certiorari* and reverse the erroneous decision of the Court of Appeals.

A. The Court of Appeals' Preemption Analysis Is Incorrect and Is Inconsistent with the Preemption Jurisprudence of this Court.

"The purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth v. Levine*, __ U.S. __, 129 S. Ct. 1187, 1194 (2009). "In all pre-emption cases," courts start with the assumption that federal law cannot supersede historic state powers "unless that was the clear and manifest purpose of Congress." *Wyeth*, 129 S. Ct. at 1194-95. To determine whether Congress clearly and manifestly intended to preempt state law, courts must consider the language, structure, purpose and history of the relevant federal

statute. *See, e.g., Altria Group, Inc. v. Good*, __ U.S. __, 129 S. Ct. 538, 543 (2008).

1. The Court of Appeals Failed to Properly Examine Congressional Intent as a Guide to the EPCA Preemption Provision's Reach.

In analyzing the scope of the preemption provision in the EPCA, the Court of Appeals erred by failing to consider the structure, purpose and history of the statute in order to determine what Congress intended the reach of the EPCA preemption provision to be. *See Altria*, 129 S. Ct. at 543 ("If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains."). The Court of Appeals was required to consider both the objectives of the EPCA and the nature of the effect of the Lease Cap Rules on fuel economy standards in order to determine whether the Rules are "related to" fuel economy standards, as Congress intended that phrase to be read in the EPCA. *See Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.*, 519 U.S. 316, 325 (1997) (to determine whether state law has forbidden connection to preempted subject matter, court looks to objectives of federal statute as guide to scope of state law that Congress understood would survive, as well as to nature of effect of state law on preempted subject matter). By examining only the text of the provision in question, the Court of Appeals reached an overbroad interpretation of "related to" that conflicts with this Court's holdings and violates the federalism safeguards that protect state sovereignty.

This Court has repeatedly instructed that, in interpreting a statutory provision that expressly preempts state law, the analysis begins with the presumption against preemption. *See Altria*, 129 S. Ct. at 543; *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) (all decided on express preemption grounds). This principle applies "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied.'" *Wyeth*, 129 S. Ct. at 1194 (citations omitted). It applies to both the "'question whether Congress intended any pre-emption at all' and to 'questions concerning the scope of intended invalidation of state law.'" *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 260-61 (2004) (Souter, J., dissenting) (citing *Medtronic*, 518 U.S. at 485).

Here, the field of regulation is taxicab services, a traditionally local matter. *See Buck v. California*, 343 U.S. 99, 102 (1952) (operation of taxicabs is local business, which Congress has left largely to the states). The regulations at issue here regulate taxicab lease rates and do not impose general requirements concerning fuel economy for vehicles either sold or purchased in New York City. The Rules change the existing schedule of lease rates in order to remove disincentives for the purchase of hybrid vehicles. The fact that the Lease Cap Rules create incentives for the purchase of hybrid vehicles does not convert the Rules into a preempted regulation of fuel economy standards. Because the regulation of taxicab services is a traditionally local matter, the Court of Appeals' analysis of the scope of

the EPCA preemption provision should have begun with "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

In enacting the EPCA, the clear and manifest purpose of Congress was to make the regulation of motor vehicle fuel economy standards the exclusive province of the federal government through establishment of the federal CAFE program. *See* 49 U.S.C. §§ 32,901-32,919 (2010). Congress established national uniformity as an important goal of the EPCA because myriad different fuel economy standards would impose a tremendous hardship on the automotive industry. *See* 49 U.S.C. § 32919(a) (preempting any state law or regulation related to fuel economy standards or average fuel economy standards). The evil that Congress sought to avoid was "any manufacturer being required to comply with differing State and local regulations with respect to automobile or light-duty truck fuel economy." S. Rep. No. 94-179, at 25 (1975) (internal quotation marks omitted). Congress did not enact the EPCA preemption provision in order to prevent local regulators from establishing incentive programs designed to encourage the purchase of commercially available hybrid and clean diesel taxicabs. "Neither before or since the enactment of the EPCA has Congress sought to bring the taxicab industry under federal regulatory control." Brief for the United States as Amicus Curiae at 11, *MTBOT II*, 615 F.3d 152 (2d Cir. 2010) (No. 09-2901). Because Congress did not clearly and manifestly express an intent to preempt local

taxicab regulations, the Court of Appeals erred in failing to apply the presumption against preemption in this case. *See Cipollone*, 505 U.S. at 516-17 (using presumption against preemption to support a narrow interpretation of an express preemption provision).

Not only does the decision of the Court of Appeals fail to apply the presumption against preemption to a field of traditional state regulation, the decision conflicts with this Court's holdings that give a practical meaning to the otherwise boundless "relate to" language found in numerous express preemption provisions.[1] The EPCA language that preempts state laws "related to fuel economy standards or average fuel economy standards," 49 U.S.C. § 32919(a), on its face embodies the same limitless breadth as that found in the Employee Retirement Income Security Act (ERISA) that preempts state laws "insofar as they . . . relate to any employee benefit plan," 29 U.S.C. § 1144(a) (2010). But this Court has explained in the context of ERISA that the term "relate to" is "unhelpful" and "frustrating," requiring examination of the objectives of the federal legislation. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). Thus, notwithstanding its broad scope, the term

1. *See, e.g.*, Federal Cigarette Labeling Act, 15 U.S.C. § 1334(a) (preempting statements relating to smoking and health); Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 360(k)(a) (Medical Device Amendments) (preempting requirements relating to safety or effectiveness); Clean Air Act, 42 U.S.C. § 7543(a) (preempting standards relating to control of emissions); Airline Deregulation Act, 49 U.S.C. § 1305(a)(1) (preempting laws relating to air carriers' rates, routes, or services).

"relate to" cannot be taken "to extend to the furthest stretch of its indeterminacy," or else "for all practical purposes pre-emption would never run its course." *Id. at 655*; *see also Dillingham*, 519 U.S. at 335 (Scalia, J., concurring) ("[A]s many a curbstone philosopher has observed, everything is related to everything else."). Faced with this broad language, the "pre-emption claims [must] turn on Congress' intent," not the uncritically literal application of "relate to." *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001) (cautioning against an 'uncritical literalism' that would make preemption turn on 'infinite connections').

When it used the broad phrase "related to fuel economy standards," Congress cannot have intended that the phrase be applied to preempt local taxicab regulations promoting fuel-efficient vehicle use. The regulation of taxicab services is an area that had been the subject of pervasive local regulation for decades prior to passage of the EPCA in 1975. So long as the regulations do not set fuel economy standards and do not interfere with federal regulation of the average fuel economy of automobile manufacturers, there is no preemption under the EPCA. Surely Congress could not have intended to preempt every taxicab regulation that affects a fleet owner's vehicle purchase decisions, and, consequently, the fuel economy of its taxi fleet.

In its amicus brief to the Court of Appeals filed on behalf of DOT and the United States Environmental Protection Agency, the United States stated that the Lease Cap Rules are not likely to have a significant impact on the overall federal regulation of the average fuel economy of automobile manufacturers. Brief for the

United States as Amicus Curiae at 14, *MTBOT II* (No. 09-2901). The United States explained that the Lease Cap Rules would principally affect the cost considerations that underlie vehicle purchasing decisions made by taxicab fleet owners, a group that controls approximately 35 percent of all taxicabs in New York City: around 4,500 taxicabs, out of a total of just over 13,000. *Id.* Even if the Lease Cap Rules led fleet owners to purchase exclusively hybrid vehicles, because fleet owners already purchase hybrid vehicles at a rate of 28 percent, that would only be an increase of about 3,000 hybrid purchases. *Id.*

Federal laws passed subsequently to the EPCA further demonstrate that Congress does not view the EPCA's preemptive reach as extending to state and local incentive programs. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (noting that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand" (citations omitted)). Through the Energy Policy Act of 1992, the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act and the Consumer Assistance to Recycle and Save program of 2009, each discussed *infra* at 21-23, Congress has approved and financially supported state and local measures to promote the purchase of fuel-efficient vehicles. The Court of Appeals erred in holding that the City violated federal law by setting taxicab lease rates that differentiate between hybrid and non-hybrid vehicles. Where the Lease Cap Rules are not proved to have a significant impact on the overall federal regulation of average fuel economy, it was not Congress' clear and

manifest intention to capture such rules within the EPCA preemption provision's reach. This Court should grant *certiorari* to correct this erroneous analysis of preemption under the EPCA.

2. This Court's Preemption Jurisprudence Required the Court of Appeals to Determine Whether the City's Rules Create a Preempted Mandate.

In order to determine the limits of "related to" language in express preemption provisions, this Court has examined whether the challenged state law has a "forbidden connection" to the preempted subject matter. *Dillingham*, 519 U.S. at 325. This forbidden connection is identified by looking at both the objectives of the federal law at issue as well as the nature of the effects of the state law. *Id.* In conducting this analysis, this Court has drawn a clear distinction between state laws that act as incentives and those that are actual or *de facto* mandates. *Dillingham*, 519 U.S. at 334; *Travelers*, 514 U.S. at 658-59. The Fourth, Sixth, and Ninth Circuit Courts of Appeals have all followed this framework of analysis. *See Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007); *Associated Builders & Contractors v. Mich. Dep't of Labor & Econ. Growth*, 543 F.3d 275 (6th Cir. 2008); *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 546 F.3d 639 (9th Cir. 2008) (discussed *infra* at 18-19). The Second Circuit Court of Appeals did not. As a result, the Court of Appeals' decision in this case conflicts with the decisions of these other courts of appeals and results in exactly the type of overbroad reading of a "related to" preemption provision that this Court cautions against.

See Travelers Indem. Co. v. Bailey, __U.S.__, 129 S. Ct. 2195, 2204 (2009) ("There is, of course, a cutoff at some point, where the connection . . . would be thin to the point of absurd.").

In *Travelers*, this Court held that a state regulation requiring hospitals to collect surcharges from patients covered by a commercial insurer but not from patients insured by a Blue Cross/Blue Shield ("the Blues") plan was not preempted because it did not "relate to" employee benefit plans within the meaning of ERISA. This Court found that "[a]lthough there is no evidence that the surcharges will drive every health insurance consumer to the Blues, they do make the Blues more attractive (or less unattractive) as insurance alternatives and thus have an indirect economic effect on choices made by insurance buyers, including ERISA plans." *Travelers*, 514 U.S. at 659. This Court explained that for the surcharge, which essentially acted as an incentive for consumers to contract with the Blues, to be preempted by ERISA, it would have to force all health insurance consumers to do so. *Id.* at 664.

Similarly, in *Dillingham* this Court held that a California law allowing those contractors participating in state-certified apprentice programs to pay apprentices lower wages was not preempted by ERISA, even though it created indirect incentives for ERISA plans to obtain state certifications. Relying on *Travelers*, this Court found that California's law did not have a forbidden connection with or "relate to" ERISA plans where it "alters the incentives, but does not dictate the choices facing ERISA plans." *Dillingham*, 519 U.S. at 334. This Court explained that "it has not been

demonstrated here that the added inducement created by the wage break available on state public works projects is tantamount to a compulsion upon apprenticeship programs." *Id.* at 333.

In *Egelhoff*, this Court struck down a Washington State law that directed a choice of beneficiary that conflicted with the choice provided in an ERISA plan. To determine whether the state law was related to an ERISA plan, this Court followed the framework of analysis set forth in *Dillingham* and examined both the objectives of the ERISA statute, as well as the nature of the effect of the state law on ERISA plans. *Egelhoff*, 532 U.S. at 147. Applying this analysis, this Court held that a state or local law has an impermissible connection with ERISA plans where it "binds ERISA plan administrators to a particular choice of rules for determining beneficiary status[,] . . . rather than [allowing administrators to pay the benefits] to those identified in the plan documents." *Id.*

Following this framework of analysis, the Fourth, Sixth and Ninth Circuit Courts of Appeals recognized that the interpretation of "related to" in a preemption provision required them to determine whether the challenged laws mandated, or effectively mandated, something within the area that Congress intended to exclusively control. In *Retail Indus. Leaders Ass'n v. Fielder*, the Fourth Circuit held that a Maryland law was preempted by ERISA because it left employers with "no reasonable choices" except to change how they structure their employee benefit plans. 475 F.3d at 190-97 (state law has impermissible connection with an ERISA plan if it directly regulates or effectively mandates some

element of the ERISA plan). In *Associated Builders & Contractors v. Michigan Department of Labor & Economic Growth*, the Sixth Circuit held that a Michigan law was not preempted by ERISA because it did not mandate something within the scope of issues that ERISA prohibits the states from regulating. 543 F.3d at 280-85 (noting that compulsion is a necessary condition for ERISA preemption). In *Golden Gate Restaurant Ass'n v. City & County of San Francisco*, the Ninth Circuit held that ERISA does not preempt a San Francisco ordinance where the ordinance offers employers "a meaningful alternative" that allows them to preserve the existing structure of their ERISA plans. 546 F.3d at 654-60 (upholding local ordinance because it does not require any employer to adopt an ERISA plan or other health plan, nor require any employer to provide specific benefits through an existing ERISA plan or other health plan). In contrast, here the Court of Appeals found that "the district court's conclusion that the [Lease Cap Rules] effected a mandate is irrelevant to our analysis." App. 12a. While the district court's conclusion that the Rules effectively mandate the purchase of hybrid vehicles is incorrect, the Court of Appeals should have reached this issue in order to determine whether the challenged Rules are preempted by the EPCA.

The Lease Cap Rules do not set fuel economy standards, establish manufacturer requirements, or create purchase requirements. They establish different maximum lease rates for hybrid and non-hybrid vehicles to provide incentives for reduced fuel usage and cleaner taxis. The Court of Appeals erred in failing to determine whether the Lease Cap Rules mandated, or effectively

mandated, something within the area that Congress intended to exclusively control, *i.e.*, the setting of fuel economy standards. Where the Lease Cap Rules neither mandate the purchase of hybrid vehicles nor require fleet owners to purchase vehicles that meet certain mileage standards, they lack the impermissible connection to fuel economy standards that Congress sought to preempt under the EPCA. This Court should grant *certiorari* to clarify that laws or regulations that do not bind the affected parties to any particular choice do not function as a regulation of a preempted area of law.

B. This Court's Review Is Needed Because the Court of Appeals' Decision Frustrates Congressional Intent and Prevents States and Municipalities from Promoting the Use of Clean, Fuel-Efficient Vehicles.

While the EPCA preempts the states from setting their own fuel economy standards, Congress has since passed laws encouraging and funding state and local incentive programs that promote the purchase of fuel-efficient vehicles such as hybrids. The Court of Appeals' erroneous ruling, that the City's lease rate incentive for hybrid taxis is preempted regardless of whether it functions as a *de facto* mandate, puts innumerable state and local incentive programs at risk and runs directly counter to congressional efforts to promote fuel-efficient vehicle purchases. This Court's immediate intervention is required in order to prevent other state and local governments from concluding that the EPCA preempts them from enacting clean-vehicle incentive programs and to prevent other federal courts from adopting the Court of Appeals' flawed approach.

1. Congress Has Long Encouraged State and Local Incentive Programs for Fuel-Efficient Vehicles.

Far from preempting state and local incentive programs for the purchase of fuel-efficient vehicles, Congress has actively legislated to encourage such initiatives. The Energy Policy Act of 1992, the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU") and the Consumer Assistance to Recycle and Save ("CARS") program of 2009 (commonly known as "Cash for Clunkers") all post-date the 1975 passage of the EPCA and demonstrate congressional recognition and support of state and local efforts in this area.

Like the EPCA, the purpose of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified as amended in scattered titles of U.S.C.), is to reduce dependence on foreign oil. *See* H.R. Rep. No. 102-474(I), at 132-33 (1992), as reprinted in 1992 U.S.C.C.A.N. 1954, 1955-56. The Energy Policy Act included a provision that invited state and local governments to design comprehensive plans to accelerate the introduction and use of alternative fueled vehicles, including hybrid electric vehicles. 42 U.S.C. § 13235 (2010). Through this provision, Congress offered federal financial assistance for qualifying state and local programs, with the goal of introducing substantial numbers of alternative fueled vehicles into the national market. In addition to federally-affiliated programs, the law also clearly contemplated that some state and local incentive programs would be undertaken outside the auspices of the Energy Policy Act. *See* 42 U.S.C. § 13235(c)(2)(C) (requiring the Secretary of Energy to include in his annual report "a description of Federal, State, and local

programs undertaken in the various States, *whether pursuant to a State plan under this section or not*, to provide incentives for the introduction of alternative fueled vehicles") (emphasis added).

With SAFETEA-LU, Pub. L. No. 109-59, 119 Stat. 1144 (2005) (codified as amended in scattered sections of 23 U.S.C.), Congress explicitly authorized those states receiving federal highway funds to establish incentives for the use of fuel-efficient vehicles in high occupancy vehicle ("HOV") lanes, regardless of whether the vehicles otherwise meet the applicable occupancy requirements for HOV lanes.[2] *See* 23 U.S.C. § 166 (2010). State regulations or laws adopted under this provision would necessarily discriminate between vehicle models based on the vehicles' emissions characteristics or relative fuel efficiency. Congress makes clear that the states have the authority to determine whether to adopt HOV lane incentives and to determine the specific criteria upon which to base to the award of HOV lane incentives. *See* 23 U.S.C. § 166(b)(5); *see also* H.R. Rep. No. 109-203, at 852-53 (2005) (congressional intent is to allow states "broad discretion" to set stricter criteria for fuel economy when determining which vehicles qualify for state HOV lane exceptions).

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2. Most major highway projects in the United States are predominantly funded with federal highway funds, and as a condition of federal funding for a project, states must accept and agree to comply with the applicable terms and conditions set forth in title 23 of the United States Code relative to the project. *See* 23 U.S.C. § 106(a)(2); 23 C.F.R. § 630.112(a). Where HOV lanes are included in a project, such conditions include requirements concerning HOV lane access and the use of HOV lane access as an incentive for driving a low emission or energy-efficient vehicle. *See* 23 U.S.C. § 166(a)(2), (b)(5).

More recently, the CARS program, Pub. L. 111-32, Title XIII, 123 Stat. 1909; Pub. L. 111-47, 123 Stat. 1972 (2009), provided $3 billion in federal incentives for the purchase of fuel-efficient vehicles. The program supplied vouchers that vehicle owners could use to trade in older, less fuel-efficient cars and trucks for newer models with higher MPG ratings. Car owners remained eligible for a voucher under CARS even if they also benefitted from other existing types of incentives: "The availability or use of a Federal, State, or local incentive or a State-issued voucher for the purchase or lease of a new fuel-efficient automobile shall not limit the value or issuance of a voucher under the Program to any person otherwise eligible to receive such a voucher." CARS § 1302(c)(1)(E). Thus, the law expressly acknowledged the existence of state and local incentives for the purchase of fuel-efficient vehicles, and ensured that federal incentives would not displace such existing state and local efforts.

As these laws demonstrate, Congress has not expressed a concern that incentives for commercially-available fuel-efficient vehicles will upset national fuel economy standards. Quite the opposite, Congress has financially supported state and local incentive programs for fuel-efficient and alternative fueled vehicles. The Court of Appeals erred in concluding that Congress intended any state or local regulation that expressly relies on a distinction between hybrid and non-hybrid vehicles to be preempted by the EPCA. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 140-59 (examining later-enacted tobacco-specific legislation to determine scope of FDA's authority to regulate tobacco). The impact of this ruling on pending and existing state and local incentive programs promoting the purchase of commercially-available fuel-efficient vehicles is by itself a sufficient reason to grant *certiorari*.

2. The Court of Appeals' Ruling Recklessly Places Hundreds of Fuel-Efficient Vehicle Incentives at Risk.

Cutting emissions of greenhouse gases and traditional pollutants and reducing dependence on petroleum are pressing national challenges to which state and local governments have creatively and enthusiastically responded. States have aggressively pursued a wide variety of plans to improve air quality, increase the use of renewable energy, promote energy efficiency and combat global climate change. Reducing emissions of greenhouse gases has been a particularly important goal for the City of New York, as its coastal location and low elevation leave it vulnerable to rising sea levels that will accompany global climate change in the decades to come. The City has committed itself to reducing citywide carbon emissions by 30 percent below 2005 levels by 2030, and the City was a plaintiff in *Massachusetts v. EPA*, 549 U.S. 497 (2007), successfully challenging the federal government's failure to regulate greenhouse gas emissions.

Making improvements in fuel efficiency and reducing emissions from motor vehicles are critical components of this larger environmental effort. Cars and light trucks account for roughly 20 percent of United States carbon dioxide emissions. U.S. EPA # 430-R-10-006, 2010 U.S. Greenhouse Gas Inventory Report, 3-12 (2010), *available at* http://www.epa.gov/climatechange/emissions/usinventoryreport.html. Cities and states across the country have taken the initiative to reduce pollution and conserve energy resources. They have created incentives for the use of cleaner, more fuel-efficient vehicles in both the private and public sectors by enacting or proposing hundreds of incentive programs for hybrid electric passenger vehicles alone.

State and local laws and regulations promoting the use of commercially-available clean, fuel-efficient vehicles are ubiquitous. Governments in all fifty states and the District of Columbia have adopted alternative fueled vehicle incentives. *See* U.S. Dep't of Energy Alternative Fuels & Advanced Vehicle Data Center: Federal & States Incentives & Laws, http://www.afdc.energy.gov/afdc/laws/ (last visited Nov. 2, 2010). These programs take on many forms and function through a variety of mechanisms, but all draw distinctions between vehicle models based on engine technology or relative fuel efficiency. Some types of incentives include sales tax[3] and income tax[4] incentives

3. *See, e.g.*, CONN. GEN. STAT. § 12-412(67)-12-412(68) (2010) (removing sales tax from alternative-fuel vehicles and conversion equipment); H.B. 2726, 2010 Leg., Reg. Sess. (Haw. 2010) (proposing exemption for plug-in hybrid vehicles from rental surcharge); H.B. 2668, 96th Gen. Assemb., 1st Sess. (Ill. 2009); MD. CODE ANN., TRANSP. § 13-815 (2010) (excise tax credit of up to $2,000 for purchase of plug-in hybrid vehicles); H.B. 2813, 186th Gen. Ct., Reg. Sess. (Mass. 2009) (proposing sales tax exemption for hybrids); OR. REV. STAT. § 316.116 (2010) (tax credit for purchase or modification of plug-in hybrid vehicles); H.B. 2180, 61st Leg., Reg. Sess. (Wash. 2009) (proposing temporary tax exemption for plug-in hybrid vehicles).

4. *See, e.g.*, COLO. REV. STAT. § 39-22-516 (2010) (income tax credit up to $6,000 for purchase or conversion of hybrid electric vehicle); CONN. GEN. STAT. §12-217i (2010) (income tax credit for ten percent of incremental cost of purchasing alternative fueled vehicle); GA. CODE ANN. § 48-7-40.16 (2010) (tax credit of up to $5,000 for purchase of low-emission or zero-emission vehicles); H.B. 1654, 2010 Leg., Reg. Sess. (Haw. 2009) (proposing $2000 tax credit for taxi fleet owners to purchase hybrid vehicles); IOWA ADMIN. CODE r. 701-40.67(422) (2010) ($2000 income tax deduction for hybrid vehicles); LA. REV. STAT. ANN. § 47:6035 (2010) (income tax credit for fifty percent of cost

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for the purchase of hybrid vehicles or conversion kits, sales rebates for purchase of hybrid vehicles,[5] exemptions allowing hybrid vehicles to drive in HOV lanes regardless of the number of occupants in the vehicle,[6] free parking or reduced parking rates for hybrid vehicles,[7] exemption of hybrid vehicles from emissions

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of converting vehicles to electricity or other alternative-fuel); VA. CODE ANN. § 58.1-438.1 (2010) (income tax deduction for purchase of clean-fuel vehicles); W. VA. CODE § 11-6D-5 (2010) (tax credit up to $50,000 for purchase of alternative-fuel vehicles).

5. The California Air Resource Board's Clean Vehicle Rebate Program offers $5,000 cash rebates for plug-in hybrid electric vehicles. California Center for Sustainable Energy, http://energycenter.org/index.php/incentive-programs/clean-vehicle-rebate-project (last visited Nov. 2, 2010); *see also* 36 Fla. Admin. Weekly 2393 (May 21, 2010) (offering $5,000 cash rebate for plug-in hybrid conversion kits).

6. *See, e.g.*, ARIZ. REV. STAT. § 28-2416 (2010); CAL. VEH. CODE § 5205.5 (Deering 2010); COLO. REV. STAT. § 42-4-1012; GA. CODE ANN. § 32-9-4 (2010); S.B. 295, 2010 Leg., Reg. Sess. (Haw. 2009); MD. CODE ANN., TRANSP. § 25-108 (2010) (for qualified plug-in hybrids); S.B. 1920, 186th Gen. Ct., Reg. Sess. (Mass. 2009); 15 N.Y.C.R.R. §§ 9028.00, 9047.00 (2010); VA. CODE. ANN. § 33.1-46.2 (2010).

7. *See, e.g.*, Albuquerque, N.M. Code of Ordinances § 8-5-1-5 (2010) (allowing hybrids and other fuel-efficient vehicles free parking at city meters); Aspen, Colo. Mun. Code § 24.24 (2010) (allowing hybrid vehicles to park in any Residential Permit Zone or High Occupancy Vehicle (HOV) Zone space and exempting such vehicles from two-hour parking restrictions); Ferndale, Mich. Code of Ordinances § 18-90 (2010) (granting free on-street parking on all city streets and free parking in municipal parking lots to hybrid vehicles and high mileage

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inspections[8] and licensing fees,[9] retirement extensions for hybrid taxis and other for-hire vehicles,[10] taxi lease rate incentives,[11] and exemptions from highway tolls.[12]

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vehicles); HAW. REV. STAT. § 29-71 (2010) (requiring parking lots that have at least one hundred parking spaces to designate one per cent of spaces exclusively for electric vehicles); Huntington, N.Y. Town Code §§ TC3-6, TC3-21 (2010) (providing free parking at meters and requiring parking lots to designate space for hybrid vehicles); San Antonio, Tex. Code of Ordinances § 19-226 (2010) (providing free parking at city meters).

8. *See, e.g.*, IDAHO CODE ANN. § 39-116B (2010); MD. CODE ANN., TRANSP. § 23-202 (2010) (exempting plug-in hybrids from emissions inspections for the first three years after registration).

9. *See, e.g.*, Aspen, Colo. Mun. Code § 24.24 (2010) (city pays hybrid owners a $100 rebate on annual state licensing fee); reduced license tax on alternative-fuel vehicles in Arizona. ARIZ. REV. STAT. §§ 28-5801, 28-5805 (2009).

10. The City of Dallas permits hybrid and alternative-fuel taxicabs and shuttles to be up to seven years old, while regular vehicles may only be up to five years old. Dallas, Tex. City Code § 45-7.2.1(a) (2010); *see also* N.Y. City Admin. Code § 19-535 (permitting an additional 1-2 years for clean air taxicabs).

11. The City of San Francisco allows owners of hybrid taxicabs to charge an additional $7.50 per ten-hour shift, above the lease cap for non-hybrid taxicabs. S.F. Mun. Code, Police Code § 1135.2 (2010).

12. *See, e.g.*, FLA. ADMIN. CODE ANN. 14-100.004 (2010) (exempting hybrid vehicles from express lane tolls); H.F. 1956, 86th Sess. (Minn. 2009) (proposing to exempt hybrid vehicles from tolls and allowing them to use HOV lanes).

Incentive programs are an important means by which state and local governments can improve air quality and increase fuel efficiency without directly regulating fuel economy standards. Such programs have historically been an area of federal-state-local partnership, not the subject of preemption disputes. For instance, the United States Department of Energy ("DOE") Alternative Fuels and Advanced Vehicles Data Center ("AFDC") tracks many of these incentive programs and provides the public with detailed information on federal, state and local incentives for alternative fueled vehicles. AFDC: Federal and State Incentives and Laws, http://www.afdc.energy.gov/afdc/laws/ (last visited Nov. 2, 2010). DOE even provides a factsheet designed to help cities adopt successful "green taxi" programs, in which it touts lease rate incentives for hybrid vehicles as a means for putting more fuel-efficient taxicabs on the road. DOE, *Hybrid Taxis Give Fuel Economy a Lift*, DOE/GO-102009-2776 (April 2009), *available at* http://www.afdc.energy.gov/afdc/pdfs/45148.pdf.

The purpose and design of these programs is to put "greener" vehicles on the road without mandating their production or purchase. These programs, like the City's challenged lease rate incentives, seek to encourage the purchase of vehicle models that are already commercially available. Consistent with congressional intent, incentive programs have helped to put greater numbers of hybrid electric and other alternative fueled vehicles on the road over the past two decades. AFDC: Data, Analysis & Trends, Vehicles, http://www.afdc.energy.gov/afdc/data/vehicles.html (last visited Nov. 2, 2010).

This case presents a question of urgent national importance. One of federalism's chief virtues is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). As a result of the Court of Appeals' overly broad ruling, local laws or regulations, including incentive programs that distinguish between vehicle models on the basis of fuel efficiency, have now been placed at risk of preemption challenges. While state and local incentive programs for fuel-efficient vehicles have never before been considered preempted by the EPCA, this is a new area of developing law and the Second Circuit is the first federal court of appeals to interpret the EPCA preemption provision.[13] As other cities attempt to "green" their taxi fleets, taxi owners have begun to challenge these local efforts in federal

13. The preemption clause in EPCA has been interpreted by other federal district courts, most notably in *Central Valley Chrysler–Jeep, Inc. v. Goldstone*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007) and *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007). The courts in both of these cases held that state regulation of carbon emissions from motor vehicles under the Clean Air Act did not necessarily implicate preemption under the EPCA. The court in *Green Mountain* held that EPCA § 32919 preempts only laws that control or supersede a core EPCA function such as *setting* fuel economy standards. 508 F. Supp. 2d at 354. The *Central Valley* court similarly held that EPCA § 32919 should be construed as narrowly as possible and limited only to measures *establishing* fuel economy standards. 529 F. Supp. 2d at 1174-76.

courts. Cases at the district court level in the First,[14] Fifth[15] and Ninth[16] Circuits have cited the decisions in this case. Prompt resolution of the question presented is vital for the preservation of state and local governments as laboratories for innovation in the development of permissible incentive programs promoting fuel-efficient vehicle use.

14. The City of Boston's rule requiring that all new taxicabs be hybrid electric was permanently enjoined in *Ophir v. City of Boston*, 647 F. Supp. 2d 86 (D. Mass. 2009), a decision in which the district court cited extensively to *MTBOT I* and *II*. *See Ophir*, 647 F. Supp. 2d at 90-92. Boston subsequently changed its regulation to provide a $10 per shift lease rate incentive for new vehicles and an additional $8 per shift for hybrid vehicles. The district court initially enjoined that rule from the bench but later required that the parties present evidence on whether the incentive is a *de facto* mandate – similar to the evidentiary hearing held in *MTBOT II*. *See Ophir v. City of Boston*, No. 09-cv-10467-WGY (D. Mass. Feb. 25, 2010) (order granting request for evidentiary hearing). Prior to the evidentiary hearing, Boston again revised its lease rate incentives to provide only an incentive for new taxicabs, and the case was dismissed on Sept. 20, 2010.

15. In *Association of Taxicab Operators, USA v. City of Dallas*, No. 3:10-CV-769-K (N. Dist. Tex. Aug. 30, 2010), front-of-the-line privileges for compressed natural gas taxicabs at Dallas Love Field airport were challenged as preempted by the CAA. Upholding the regulation, the district court cited *MTBOT II* for the holding that incentive programs are not preempted by the Clean Air Act. It distinguished the Second Circuit's *MTBOT II* opinion on the basis that only the $12 disincentive was actually before the court. *Ass'n of Taxicab Operators* at 14.

16. In *Green Alliance Taxi Cab Ass'n v. King County*, No. C08-1048RAJ, 2010 U.S. Dist. LEXIS 72409 (W.D. Wash. June 29, 2010), King County awarded fifty new taxi licenses under a competitive selection process, one requirement of which was that the licensee agree to utilize hybrid electric vehicles with fuel economy rating of 40 MPG in the city. The award of licenses was challenged (Cont'd)

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
LEONARD J. KOERNER*
100 Church Street
New York, New York 10007
(212) 788-1010 or 1362
lkoerner@law.nyc.gov

Of Counsel

Francis F. Caputo
Susan Paulson
Adam Stolorow

Counsel for Petitioners

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as preempted by the EPCA. The district court granted summary judgment in favor of King County, distinguishing the County's action as a voluntary incentive program, in contrast to the regulatory actions of Boston and New York City in *Ophir* and *MTBOT I* and *II*, which the *Green Alliance* court considered mandates or *de facto* mandates. 2010 U.S. Dist. LEXIS 72490 at *12-13.

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JULY 27, 2010

Docket No. *09-2901-cv*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

615 F.3d 152 (2d Cir. 2010);
2010 U.S. App. LEXIS 15303; 40 ELR 20193

January 22, 2010, Argued
July 27, 2010, Decided

METROPOLITAN TAXICAB BOARD OF TRADE; MIDTOWN CAR LEASING CORP.; BATH CAB CORP.; RONART LEASING CORP.; GEID CAB CORP.; LINDEN MAINTENANCE CORP.; and ANN TAXI, INC.,

Plaintiffs-Appellees,

MIDTOWN OPERATING CORP., SWEET IRENE TRANSPORTATION CO. INC., OSSMAN ALI, and KEVIN HEALY,

Plaintiffs,

v.

CITY OF NEW YORK; MICHAEL R. BLOOMBERG, in his offical capacity as Mayor of the City of New York; THE NEW YORK CITY TAXICAB & LIMOUSINE COMMISSION; MATTHEW W. DAUS,

in his official capacity as Commissioner, Chair, and Chief Executive Officer of the TLC; PETER SCHENKMAN, in his official capacity as Assistant Commissioner of the TLC for Safety & Emissions; ANDREW SALKIN, in his official capacity as First Deputy Commissioner of TLC,

Defendants-Appellants.

JUDGES: Before: WALKER, STRAUB, and LIVINGSTON, Circuit Judges.

OPINION BY: JOHN M. WALKER, JR.

OPINION

JOHN M. WALKER, JR., *Circuit Judge*:

The Taxicab & Limousine Commission of New York City ("TLC") and several New York City officials (collectively, "the City") appeal the grant of a preliminary injunction by the United States District Court for the Southern District of New York (Paul A. Crotty, *Judge*), that enjoined the enforcement of the City's revisions to the maximum lease rates for taxicabs that effectively shifted fuel costs from drivers of fleet taxis to fleet owners to incentivize the use of hybrid-engine and fuel-efficient vehicles. The district court held that the new rules likely related to fuel economy standards and new vehicle emissions and were thus preempted under the Energy Policy and Conservation Act ("EPCA"), 49 U.S.C. § 32919(a), and the Clean Air Act ("CAA"), 42 U.S.C. § 7543(a). *Metro. Taxicab Bd. of Trade v. City of N.Y.*, 633 F. Supp. 2d 83, 105-06 (S.D.N.Y.2009).

Appendix A

BACKGROUND

In December 2007, the City issued rules requiring that new taxicabs that were put into service on or after October 1, 2008 achieve at least 25 city miles per gallon of fuel, and those that were put into service beginning October 1, 2009 achieve 30 city miles per gallon (the "25/30 MPG rule"). In September 2008, the plaintiffs, including the Metropolitan Taxicab Board of Trade and several taxi fleet operators, sued the City, seeking to enjoin the 25/30 MPG rule on the basis that it violated preemption clauses in the EPCA and the CAA.[1] The district court granted a preliminary injunction after determining that the 25/30 MPG rule related to fuel economy standards and was thus preempted by the EPCA. *Metro. Taxicab Bd. of Trade v. City of N.Y.*, No. 08 Civ. 7837, 2008 U.S. Dist. LEXIS 94021, 2008 WL 4866021 (S.D.N.Y. Oct. 31, 2008).[2] The City did not appeal that decision.

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1. The EPCA states, in relevant part: "[A] State or apolitical subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter." 49 U.S.C. § 32919(a).

The CAA states, in relevant part: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." 42 U.S.C. § 7543(a).

2. The district court, having "limited its review to the stated purpose of the rules, as published in the City Record," rejected the plaintiffs' argument under the CAA. *Metro.*

(Cont'd)

Appendix A

On March 26, 2009, the City repealed the 25/30 MPG rule, and issued new rules that regulated taxicab "lease caps" - the maximum dollar amount per shift for which taxis can be leased - to provide incentives for reduced fuel usage and cleaner taxis. Under the new rules, the lease caps for hybrid and "clean diesel" taxis are raised by $ 3 per shift.[3] 35 RCNY § 1-78(a)(3)(i). At the same time, the new rules reduce the lease caps for non-hybrid, non-clean diesel vehicles, nearly all of which are Ford Crown Victorias, in three phases. The new rules lower the per shift lease caps on the Crown Victorias, except those that are wheelchair accessible, by $ 4 on May 1, 2009; by $ 8 on May 1, 2010; and by $ 12 on May 1, 2011. The current baseline lease caps from which these adjustments are made are: $ 105 for all day shifts; $ 115 for night shifts on Sunday, Monday, and Tuesday; $ 120 for night shifts on Wednesday; and $ 129 for night shifts on Thursday, Friday, and Saturday. 35 RCNY § 1-78(a)(1). After the third phase is implemented, the lease cap difference between hybrids and Crown Victorias

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(Cont'd)

Taxicab, 2008 U.S. Dist. LEXIS 94021, 2008 WL 4866021, at *14. The district court held that the plaintiffs had failed "to show how the 25/30 Rules are a standard relating to the control of emissions from new motor vehicles." *Id.* (internal quotation marks omitted).

3. A hybrid vehicle for purposes of the new rules is a "commercially available mass production vehicle originally equipped by the manufacturer with a combustion engine system together with an electric propulsion system that operates in an integrated manner." 35 RCNY § 3-03.1(b). We use the term "hybrid" to encompass both hybrid vehicles as defined under the new rules and vehicles propelled by a "clean diesel" engine.

would be $ 15 per shift, reflecting the $ 3 upward adjustment for the hybrid lease caps and the $ 12 downward adjustment for the Crown Victoria lease caps. The new rules are designed to effectively shift fuel costs from taxi drivers, who currently pay for fuel, to fleet owners, who currently make vehicle purchasing decisions without the need to internalize fuel costs.

The plaintiffs amended their initial complaint to challenge these new rules and moved for a preliminary injunction against the enforcement of the Crown Victoria lease caps, again citing the preemption provisions of both the EPCA and the CAA. For obvious reasons, the plaintiffs did not challenge the $ 3 upward adjustment of the lease caps for hybrid taxis, which benefitted them, and that adjustment went into effect on May 1, 2009.

At an evidentiary hearing on the plaintiffs' motion, experts for both sides testified on the economic impact of the new rules on taxi fleet owners. The testimony of the plaintiffs' expert James Levinsohn tended to demonstrate that fleet owners would earn between $ 5,500 and $ 6,500 less per year for each Crown Victoria leased under the eventual $ 12 downward adjustment in comparison to leasing a hybrid under the $ 3 upward adjustment. The plaintiffs' expert estimated the current annual profit of leasing a Crown Victoria to be $ 8,518 per car per year. Thus, the lease cap reduction would lower profits by 65% to 75% for each Crown Victoria. The City did not challenge this estimated impact on plaintiffs' profits. The City's expert testified, however,

that fleet owners could still make a "reasonable rate of return" on their purchase of a Crown Victoria notwithstanding the $ 12 downward adjustment.

On June 22, 2009, the district court granted a preliminary injunction on the grounds that the plaintiffs were likely to succeed on their claims that the new rules were preempted under the EPCA and the CAA. The district court accepted the plaintiffs' expert's view of the economic impact of the new rules on fleet owners' profits and concluded that such a severe disparity in the expected profits from leasing a hybrid as compared to a Crown Victoria would leave the fleet owners with no rational alternative to leasing the former and thus amounted to a *de facto* mandate to purchase hybrid vehicles. The district court found such a mandate to be related to both fuel economy standards and the reduction of vehicle emissions, and thus sufficiently likely to be preempted under the EPCA and the CAA so as to warrant a preliminary injunction.

The City appeals the grant of the preliminary injunction.

DISCUSSION

This Court reviews the grant of a preliminary injunction for abuse of discretion. *See Almontaser v. N.Y. City Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008)(per curiam); *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007)(per curiam). "A district court abuses its discretion when it rest its

decision on a clearly erroneous finding of fact or makes an error of law." *Almontaser*, 519 F.3d at 508. In order to justify a preliminary injunction, a movant must demonstrate 1) irreparable harm absent injunctive relief; 2) "either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor," *id.*; and 3) that the public's interest weighs in favor of granting an injunction. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). "When, as here, the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard." *County of Nassau, N.Y. v. Leavitt*, 524 F.3d 408, 414 (2d Cir. 2008) (brackets and internal quotation marks omitted). In this case, the City's sole challenge to the preliminary injunction is that the plaintiffs are not likely to succeed on their preemption claims.

I. Preemption Under the EPCA

The EPCA preemption clause states:

> [A] State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.

49 U.S.C. § 32919(a).

"Since [preemption] claims turn on Congress's intent, we begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. TravelersIns. Co.*, 514 U.S. 645, 655, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995) (citations omitted). In the context of judging the scope of the preemption provision of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1144(a), the Supreme Court has held that determining whether a state law relates to a preempted subject matter requires examining whether the challenged law contains a "reference" to the preempted subject matter or makes the existence of the preempted subject matter "essential to the law's operation." *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 324-25, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997). If the law contains such a reference or makes the existence of preempted subject matter essential to the law's operation, then that state law is preempted by the federal law. *See id.* at 325 ("Where a State's law acts immediately and exclusively upon ERISA plans . . ., or where the existence of ERISA plans is essential to the law's operation . . ., that 'reference' will result in [preemption].").[4]

4. Even if there is no reference to or essential incorporation of the preempted subject matter, courts must still ask whether the law nevertheless contains requirements that "amount[] to 'connection[s] with'" the preempted subject matter. *Dillingham*, 519 U.S. at 328 (second alteration in original) (quoting *Travelers*, 514 U.S. at 658). However, because we find that the City's new rules contain a reference to fuel economy standards or make fuel economy standards essential to the operation of those rules, we need not specifically address whether the new rules have a connection with fuel economy standards.

As a threshold matter, we may rely on ERISA preemption precedents such as *Travelers* and *Dillingham* because the pertinent language in that statute is virtually identical to the text in the preemption provision of the EPCA, which preempts state laws that are "related to fuel economy standards." Compare 29 U.S.C.§ 1144(a), with 49 U.S.C. § 32919(a). Although the same "relate[] to" provision arises in different preemption statutes, we discern no basis for concluding that the meaning of the language in each provision was not intended to be the same. *Cf. Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2203, 174 L. Ed. 2d 99 (2009) (noting generally that, "[i]n a statute, 'the phrase "in relation to" is expansive'" and applying that statutory reading to the interpretation of a private settlement agreement). We note that the City itself relies on *Travelers* in challenging the district court's ruling. *See* Appellants Br. at 57, 60. For purposes of assessing preemption under the EPCA, the Supreme Court's discussions of the phrase "relate to" in ERISA cases is directly applicable.

Thus, our first inquiry in determining whether the new rules relate to "fuel economy standards," 49 U.S.C. § 32919(a), is whether they contain a reference to fuel economy standards or make fuel economy standards essential to the operation of those rules. *Dillingham*, 519 U.S. at 324-25. We conclude that they do.

The new rules expressly rely on a distinction between hybrid and non-hybrid vehicles. 35 RCNY § 1-78(a)(3) (providing for the upward and downward lease cap

adjustments on hybrid and non-hybrid vehicles, respectively). The requirement that a taxi be a hybrid in order to qualify for the upwardly adjusted lease cap does nothing more than draw a distinction between vehicles with greater or lesser fuel-efficiency. The equivalency of the term "hybrid" with "greater fuel efficiency" for purposes of the new rules is self-evident. First, the EPCA specifically requires the separate consideration of "dual fueled" vehicles, including hybrids, in the determination of national fuel economy standards. *See* 49 U.S.C. § 32901(a)(1)(J) (defining "electricity" as one form of "alternative fuel"); *see also id.* § 32905(b) (requiring the Administrator of the Environmental Protection Agency to measure the fuel economy of certain "dual fueled" automobile models in part with reference to the fuel economy of that model when operating on "alternative fuel"). Second, imposing reduced lease caps solely on the basis of whether or not a vehicle has a hybrid engine has no relation to an end other than an improvement in fuel economy across the taxi fleets operating in New York City.

Indeed, the City is unable to identify any plausible alternative reason for the imposition of such an engine-based rule. The City argues that the new rules "correct[] a structural problem with the standard vehicle lease arrangement that artificially insulates fleet owners from fuel costs." Appellants Br. at 1. This proffered reason, however, still aims at the improvement of fuel economy, which underlies the "structural problem" relied upon by the City. This argument, moreover, ignores the City's mechanism for its structural correction, which is to shift

costs solely on the basis of a vehicle's level of fuel efficiency, i.e., whether the vehicle is a hybrid. Indeed, the City's current list of approved vehicles includes every car approved for use under the now-repealed 25/30 MPG rule. The City's list of approved vehicles under the new rules, with the exception of wheelchair accessible vehicles (which are exempt from the lease cap adjustments) and the Crown Victoria, are either hybrids or achieve at least 25 miles per gallon. *See* New York City Taxi & Limousine Commission, Taxicab Vehicles in Use, *available at* http://www.nyc.gov/html/tlc (follow "Safety & Emissions" hyperlink; then follow "Taxicab Vehicles In Use" hyperlink) (last visited June 1, 2010). The virtually complete overlap of the approved vehicles under the 25/30 MPG rule and the new rules underlines further that, in furtherance of the City's regulatory purpose, "hybrid" is simply a proxy for "greater fuel efficiency." In sum, the new rules are not applicable to gasoline costs in general, nor are they neutral to the fuel economy of the vehicles to which they apply. Rather, they are directly related to fuel economy standards because they rely on fuel economy, and on nothing else, as the criterion for determining the applicable lease cap.

Because the parties appear to have assumed before the district court that the new rules did not directly reference fuel economy standards or incorporate those standards into the new rules' operation, they and the district court focused on whether the new rules effectively mandate the use of fuel efficient vehicles through their economic impact. In that context, the district court rejected the City's argument that the new

rules are permissible because they only provide an incentive, rather than create a *de facto* mandate, for the purchase of hybrid vehicles. Appellants Br. at 7, 28. This attention to economic impact was misguided, however, because the rules in question directly regulate the relevant preempted subject matter.

II. The Plaintiffs' Preliminary Injunction

Although we find the district court's conclusion that the rules effected a mandate irrelevant to our analysis, the district court's preliminary injunction was appropriate. The City does not challenge the district court's determination that the plaintiffs face irreparable harm absent injunctive relief, nor does it challenge the preliminary injunction on either the balance of hardships or public interest prongs of the preliminary injunction standard. The sole issue before us is whether the plaintiffs have established a likelihood of success on the merits. *Leavitt*, 524 F.3d at 414.

The City's new rules, based expressly on the fuel economy of a leased vehicle, plainly fall within the scope of the EPCA preemption provision. The plaintiffs, therefore, have demonstrated a likelihood, indeed a certainty, of success on the merits, and we affirm the district court's preliminary injunction on this ground. Because preemption under the EPCA is sufficient to affirm the preliminary injunction, there is no need to reach the question of whether the preemption provision of the CAA would invalidate the City's new rules.

Appendix A

CONCLUSION

We AFFIRM the district court's order granting the preliminary injunction.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DECIDED JUNE 22, 2009

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

08 Civ. 7837 (PAC)

633 F. Supp. 2d 83; 2009 U.S. Dist. LEXIS 52658; 70 ERC (BNA) 1236; 39 ELR 20140

June 22, 2009, Decided
June 22, 2009, Filed

METROPOLITAN TAXICAB BOARD OF TRADE; MIDTOWN CAR LEASING CORP.; BATH CAB CORP.; RONART LEASING CORP.; GEID CAB CORP.; LINDEN MAINTENANCE CORP.; and ANN TAXI INC,

Plaintiffs,

-against-

CITY OF NEW YORK; MICHAEL R. BLOOMBERG, in his official capacity as Mayor of the City of New York; THE NEW YORK CITY TAXICAB & LIMOUSINE COMMISSION ("TLC"); MATTHEW W. DAUS, in his official Capacity as Commissioner, Chair, and Chief Executive Officer of the TLC; PETER SCHENKMAN, in his official capacity as Assistant Commissioner for Safety & Emissions of the TLC; and ANDREW SALKIN, in his official capacity as First Deputy Commissioner of the TLC,

Defendants.

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JUDGES: PAUL A. CROTTY, United States District Judge.

OPINION BY: PAUL A. CROTTY

OPINION

OPINION & ORDER

HONORABLE PAUL A. CROTTY, United States District Judge:

This case involves a dispute between New York City taxicab fleet owners and the City's Taxicab & Limousine Commission ("TLC"), relating to new TLC regulations that promote the purchase of hybrid taxicabs by reducing the rates at which taxicab owners may lease their vehicles to taxi drivers—thus reducing the owners' overall profit—if the vehicle does not have a hybrid or clean-diesel engine. The questions in this case are whether the TLC's new rules are a mandate to taxicab owners to purchase only hybrid or clean-diesel vehicles, and whether such a mandate is preempted by federal law.

The history of this case is relevant: on October 31, 2008, the Court preliminarily enjoined New York City's requirement that all new taxicabs meet a specific miles-per-gallon ("mpg") rating. The mpg regulation required taxicab owners in New York City to purchase vehicles with hybrid or clean-diesel engines, or wheelchair-accessible vehicles. The Court found that the federal

Energy Policy and Conservation Act ("EPCA") preempted the local imposition of mpg standards. The City immediately announced it would pursue an alternative strategy. Mayor Bloomberg stated that, "The courts are not the only way we can reach our goal of a cleaner fleet of taxi cabs. Greening the taxi fleet is a major priority, and we are going to use every mechanism at our disposal to make New York a cleaner, healthier city."[1]

The City pursued a regulatory framework that would encourage taxicab fleet owners to buy hybrid taxicabs in increasing numbers and discourage them from purchasing long bodied, conventionally powered taxicabs, which the City had approved for use in 2001. Under the City's new rules, if an owner purchases a taxicab with a hybrid or clean-diesel engine (hereinafter, "hybrid"), the rate at which the vehicle can be leased to a driver for a 12-hour shift is increased by $ 3. By contrast, if an owner leases out a non-hybrid, non-wheelchair accessible vehicle (i.e. a Crown Victoria), the maximum lease rate an owner may charge a driver is reduced by $ 4 immediately, $ 8 in May 2010, and $ 12 in May 2011. The new rules substantially reduce profits for the owner who continues to choose non-hybrid taxicabs, and Plaintiffs challenge the disincentive aspect of the new regulations.

The City explained its desire for the new regulation:

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1. Bill Sanderson, *Fed Red Light on Mike in "Green Cab" Fight*, N.Y. Post, Nov. 1, 2008, at 2.

Appendix B

> Last month, we hit a speed bump in our efforts to turn New York City's yellow cabs green when the courts upheld an archaic law, preventing us from reducing greenhouse gases and improving air quality . . . By offering incentives that will encourage more taxi fleet owners to purchase hybrids, we have found another avenue to reach our goal of greening our yellow cabs, improving our air quality, and reducing our carbon emissions.

See Press Release, Office of the Mayor, Mayor Bloomberg Announces New Incentive/Disincentive Program to Reach Goal of Green Taxi Fleet (Nov. 14, 2008). The same press release quoted TLC Commissioner Matthew Daus as stating:

> Our goal from the beginning was to get fuel efficient taxis on the road using whatever appropriate methods required to achieve our goal. The new program will incentivize the purchase of cleaner vehicles, while ensuring taxi drivers are not penalized because a taxicab owner is reluctant to make the wiser purchase of a hybrid vehicle. The 1,551 hybrid taxicabs already on the road have saved their drivers lots of money, while contributing to cleaner air. This incentive package will help us take these advances to the next level, and help our city become a cleaner, healthier place.

Id.

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After several months of study, the TLC promulgated the new regulations. The regulations: (1) eliminated the prior requirement that determination of lease rates and changes thereof be based on costs, and substituted policy concerns as the key criterion for determining lease rates; (2) described the incentives for hybrids (higher lease rate) and the disincentives for conventionally powered taxicabs (lower lease rates, in increasing amounts over the next two years); and (3) did not grandfather taxis purchased by owners subsequent to 2001, when the City began mandating taxicabs with Crown Victoria dimensions.

The City states that the new regulations correct a structural disincentive that prevented many taxicab owners from switching their fleets to hybrid vehicles, while also meeting the goal of improving taxicab fuel efficiency and minimizing the effect of taxicab emissions on the environment.

The Mayor announced the new regulations:

> We have never let roadblocks prevent us from achieving our goals. So when the courts prohibited New York City from taking forward-looking actions that would create cleaner air and a healthier place to live, we said we would find another way to continue to green the City's yellow cabs - and we have. Today's actions by the Taxi and Limousine Commission provide financial incentives for the purchase of fuel efficient taxis and will

> speed up the phase-out of older, inefficient vehicles. Taxi fleet owners will have more reason to purchase cleaner vehicles and taxi drivers will be held financially harmless for the vehicle purchase decisions of fleet owners. The result will be more clean taxis on City streets. Turning yellow cabs green will be another step towards improving our air quality, reducing the use of fossil fuels and lowering our carbon emissions.

See Press Release, Office of the Mayor, Statement of Mayor Bloomberg on Passage of Green Taxi Incentives by the Taxi and Limousine Commission Board of Commissioners (Mar. 26, 2009).

The TLC Commissioner echoed and amplified the Mayor's remarks:

> It is good public policy to incentivize the purchase of vehicles that will help us to clean our environment, while equalizing the playing field for drivers who have no say in the kinds of vehicles they drive, and how big a role fuel costs play in their income. With more than 15% of the city's taxi fleet already clean-fueled, this was the right thing to do, and it was the right time to do it.

See Press Release, TLC, NYC Taxi and Limousine Commission Approves Hybrid Incentive Plan (Mar. 26, 2009).

Appendix B

Plaintiffs filed an Amended Complaint challenging the City's revised regulations and now bring a motion for a preliminary injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure, to enjoin the City's enforcement of the rules.

At the beginning it is appropriate to point out what this case is not about. No one questions the desirability of fuel efficient and environmentally "clean" vehicles; all parties agree that the City's pursuit of these goals is laudable. Nor is there a question whether New York City can incentivize the purchase of certain types of taxicabs. Several years ago the City issued new taxi medallions which were limited to hybrid vehicles. *See* N.Y. City Administrative Code § 19-532(b) (2003). There was no challenge to the incentive. Recently the City extended the service life of hybrid vehicles from three to five years. *Id.* § 19-535(b) (2006). Again, there was no challenge to this incentive. Similarly, in the present case, Plaintiffs do not challenge the $ 3 per shift "incentive" increase in lease rates for hybrid taxicabs.

On the other hand, there is no doubt that the City could not demand that new motor vehicles purchased, sold, or operated in New York City meet certain mileage or emission standards. The City does not contend otherwise. The issue in this case is more limited and the question is more focused: do the new lease cap regulations have the preempted effect of mandating that taxicab owners purchase only taxicabs with hybrid or clean diesel engines.

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The Court's purpose is not to interfere with government officials taking actions in the public interest. Increasing the number of hybrid taxicabs is an appropriate and important governmental priority. Congress, however, has exercised its powers and imposed both national fuel efficiency and engine emissions standards. Congress also directed that the federal standards controlled and preempted state and local governments from acting where Congress has already spoken. If the new rules are in fact a mandate, the Court must determine whether the City's program interferes with the Congressional intent to preserve exclusive jurisdiction. This involves two questions.

The Court first must determine whether the City's new lease cap regulations are a mandate to purchase hybrid vehicles. Plaintiff taxi owners say that they have no real choice under the proposed rules; they will be forced to buy only hybrid vehicles to sustain economic viability. The City maintains that the new lease cap rules permit owners to continue to make a profit, and, therefore, taxicab owners still have a choice. Second, the Court must determine whether the new rules, if they are in fact a mandate, are "related to" mileage or emission standards so that the City's law is preempted by federal law governing those two issues.

The Court finds that Congress intended to retain control over those two federal interests. The effect of the new regulations is to mandate taxicab owners to buy only hybrid vehicles. The requirement is preempted in the same way as the City's earlier attempt to impose mpg requirements. Plaintiffs have demonstrated a likelihood of success in showing that: (1) the new regulations are preempted by federal law because they

are a *de facto* mandate to purchase hybrid taxicabs; and (2) these requirements are related to fuel economy standards under the EPCA and the control of emissions under the federal Clean Air Act ("CAA"). Accordingly, the Plaintiffs' motion for a preliminary injunction is GRANTED.

BACKGROUND

I. The Court's Prior Decision

In September 2008 the Plaintiffs[2] moved to enjoin TLC Rule § 3.03(c)(10)-(11), which required all new taxicabs in New York City to be either wheelchair accessible or to have a minimum city rating of 25 mpg by October 1, 2008,[3] and a minimum city rating of 30 mpg by October 1, 2009 (hereinafter, the "25/30 Rules"). (*See* Declaration of Elizabeth Saylor ("Saylor Decl.") Ex. 1 (containing enjoined TLC Rule § 3-03(c)(10)-(11)).) The only vehicles that met the 25/30 Rules contained hybrid or clean-diesel engines. Plaintiffs argued that the 25/30 Rules were preempted by the EPCA and the CAA.[4]

2. The Plaintiffs in the original action are not the same Plaintiffs in this action, although there is some overlap.

3. The City suspended implementation of the prior rules until November 1, 2008, so that the parties and the Court could properly brief and consider the dispute.

4. The EPCA preemption clause says that a state or political subdivision of a state may not "adopt or enforce a law or regulation related to fuel economy standards . . . ." 49 U.S.C. § 32919(a). The CAA preemption clause says that no state or political subdivision of a state "shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines . . . ." 42 U.S.C. § 7543(a).

Plaintiffs claimed irreparable injury because the EPCA and CAA provided no private right of action, and accordingly they would be unable to recover their financial damages under 42 U.S.C. § 1983, unless the Court issued an injunction.

On October 31, 2008, the Court found that the EPCA preempted the 25/30 Rules because the rules, by their own language, clearly related to fuel economy standards by setting fuel economy standards for taxicabs. *See Metro. Taxicab Bd. of Trade v. City of New York*, No. 08 Civ. 7837 (PAC), 2008 U.S. Dist. LEXIS 94021, 2008 WL 4866021, at *9 (S.D.N.Y. Oct. 31, 2008). The Court rejected the City's argument that the 25/30 Rules were not preempted because they did not actually interfere with the goals of the EPCA. The Court, relying on *Engine Manufacturers Association v. South Coast Air Quality*, 541 U.S. 246, 124 S. Ct. 1756, 158 L. Ed. 2d 529 (2004), found that allowing one municipality to affect fuel economy standards could have an unwanted aggregate affect, if other states or municipalities followed suit. *See Metro. Taxicab*, 2008 U.S. Dist. LEXIS 94021, 2008 WL 4866021, at *10 (citing *Engine Mfrs.*, 541 U.S. at 255.) The Court found that the CAA did not preempt the 25/30 Rules, however, because the rules were silent concerning emissions. The Court examined two cases that discussed the interplay between the EPCA and the CAA, and determined that even if emissions reduction was a secondary consequence of the rules, it did not follow that the rules were automatically preempted. 2008 U.S. Dist. LEXIS 94021, [WL] at *13-14 (analyzing *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*,

508 F. Supp. 2d 295 (D. Vt. 2007), and *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007)). Because the EPCA preempted the 25/30 Rules and Plaintiffs would suffer irreparable harm, the Court issued a preliminary injunction.

II. The New Regulations

On March 26, 2009, the TLC repealed the 25/30 Rules and enacted new regulations. The new regulations, TLC Rule § 1-78(a)(3), created incentives to increase taxi owners' use of hybrid vehicles and disincentives to decrease their use of Crown Victoria model taxicabs. When fully implemented the regulations weighted the disincentives four times greater than the incentive. The Crown Victoria Long Wheel Base model ("Crown Victoria") has been the dominant model for New York City taxicabs since the TLC approved it for use in 2001. From 2001 to 2005, it was the sole vehicle that complied with TLC specifications for taxicabs. (*See* Declaration of Andrew Salkin ("Salkin Decl.") P 5.) Of the more than 13,000 yellow taxicabs, approximately 2,060 (16%) are either hybrid or clean-diesel vehicles, while the balance of the remainder are Crown Victorias. (*Id.* PP 4, 8.)

The new regulations affect the maximum lease rate that vehicle owners may charge drivers leasing a taxicab per 12-hour shift. The prior rules set a maximum lease rate of: $ 105 for all day shifts; $ 115 for the night shift on Sunday, Monday, and Tuesday; $ 120 for the night shift on Wednesday; and $ 129 for the night shifts on Thursday, Friday, and Saturday. *See* TLC Rule § 1-

78(a)(1). The standard lease cap for one shift for a week period is a maximum of $ 666. *Id.* § 1-78(a)(2).

The challenged regulation, TLC Rule § 1-78(a)(3)(ii) (hereinafter, "Lease Cap Rules" or "Rules"), reduces the maximum lease cap for all taxis not hybrid or clean diesel, or wheelchair accessible.[5] The first reduction of $ 4 per shift was to go into effect on May 1, 2009.[6] The reduction is increased to $ 8 per shift on May 1, 2010; and to $ 12 per shift on May 1, 2011. *Id.* § 1-78(a)(3)(ii). The Rules also reward use of hybrid vehicles by increasing the maximum lease cap for hybrid taxicabs by $ 3 per shift. *Id.* § 1-78(a)(3)(i). As indicated, Plaintiffs do not challenge the incentive aspect of the Lease Cap Rules, which have taken effect.

The new Rules provide that taxi owners receive the $ 3 lease cap upward adjustment if they "hack up," or transform, their taxicab pursuant to the specifications in TLC Rule § 3-03.1, which describes hybrid electric taxicab specifications. The Rules define a hybrid vehicle as a "commercially available mass production vehicle originally equipped by the manufacturer with a combustion engine system together with an electric propulsion system that operates in an integrated manner." *Id.* § 3-03.1(b). The only vehicles that meet

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5. As previously stated, the Court uses the phrase "hybrid" to include all taxis with hybrid or clean diesel engines. The lease rates for wheelchair-accessible vehicles are unchanged under the Lease Cap Rules. (*See* TLC "Statement of Basis and Purpose.")

6. Upon the Court's Order, the City suspended implementation of § 1-78(a)(3)(ii) until July 1, 2009.

the new requirement are in fact the same hybrid vehicles that met the City's now abandoned 25/30 Rules. The City recognizes that its new regulatory mechanism "operates within the same universe of approved vehicles." (*See* Defendants' Letter Brief of May 22, 2009 ("Def. May 22, 2009 Letter") 5.)

III. Promulgation and Stated Purpose of the Lease Cap Rules

At the same time that it enacted the Lease Cap Rules, the TLC also rescinded a rule, in place since 1997, prohibiting the TLC from reducing the maximum lease rate unless the TLC found "substantial evidence of reduced operating expenses of the affected medallion owners." *Id.* § 1-78(e).[7] After eliminating the requirement for a cost-based rate determination, the

7. The full text of the rescinded § 1-78(e) is:

> The Commission *shall not lower any upper limitation of lease rates* established in Rule 1-78 herein, *unless* in the view of the Commission, the record before the Commission includes *substantial evidence of reduced operating expenses of the affected medallion owners.* The Commission shall not raise any upper limitation of lease rates established in Rule 1-78 herein, unless in the view of the Commission, the record before the Commission includes substantial evidence of increased operating expenses of the affected medallion owners. The factors to be reviewed in consideration of any proposed increase in the upper limitation of lease rates shall also include, but not limited to [sic], the

(Cont'd)

TLC substituted "the Commission's assessment of appropriate policy considerations" for determining lease rates. *Id.* § 1-78.1(b). These two rule changes rescinded the TLC's longstanding "cost-based" approach for enacting lease cap adjustments and permitted a "policy-based" approach.

As anticipated by the City's press releases of November 2008 and March 2009,[8] the TLC's "Statement of Basis and Purpose" for the new Lease Cap Rules is to replace the enjoined rules in order to "create incentives for taxicab owners to buy cleaner vehicles." (*See* Declaration of Ramin Pejan ("Pejan Decl.") Ex. J.) The statement continues by noting that the Rules "are intended to place gasoline costs on the owner who chooses the vehicle," rather than on the driver, who pays gasoline costs but "may have no voice in the owner's choice of vehicles." *Id.* Under the new Rules the costs to the driver will be roughly equal between driving a

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(Cont'd)

> effects on driver earnings and the retention of experienced drivers.

TLC Rule § 1-78(e) (emphasis added).

8. The Court, in its prior decision in this case, "limited its review to the stated purpose of the [25/30 Rules], as published in the City Record." *See Metro. Taxicab*, 2008 U.S. Dist. LEXIS 94021, 2008 WL 4866021, at *14. The City Record specified fuel efficiency standards which were clearly related to federal requirements. Here, however, the regulations refer to "hybrids" and are silent on their "relatedness" to either fuel economy or emissions. That silence does not end the inquiry and the Court will examine the full record, including public statements, to determine the meaning of the new rules.

hybrid and non-hybrid vehicle, while the lease income to owners of non-hybrid taxis will be reduced, according to the TLC.[9] *Id.*

The Lease Cap Rules create a $ 15 spread by 2011 between what owners of hybrid taxicabs and owners of Crown Victorias may charge in maximum lease rates per vehicle per shift. The City states that the Lease Cap Rules correct a structural disincentive in the current rules that prevented many taxi owners from transitioning to hybrid vehicles. (*See* Salkin Decl. P 32.) This disincentive existed because taxi drivers, not owners, pay for gasoline, and it costs more to transform a hybrid vehicle into a taxi. Accordingly, because the gas costs are irrelevant to taxi owners, many owners choose the cheaper and time-tested option of hacking up Crown Victorias.

The TLC determined that the incentive rate for hybrids should be based on Plaintiffs' representations in the prior *Metropolitan Taxicab* case that it costs approximately $ 6,000 more to purchase and hack up a hybrid vehicle as compared to a Crown Victoria. (Salkin Decl. P 26.) Dividing $ 6,000 by three years, the statutory life of a taxicab, is $ 2,000. That figure divided

9. The City's sensitivity to the impact of fuel costs on taxicab drivers' income does not appear to be consistent with the TLC's denial last year of the New York Taxi Workers Alliance's request for a fuel surcharge to offset the impact of rising gasoline costs. The TLC found that even with the higher gasoline costs, taxicab drivers made a living wage. (*See* Salkin Decl. P 15; Pejan Decl. Ex. I.)

by the maximum number of shifts per year, 730, equals approximately $ 2.75 per shift, which the TLC rounded up to $ 3. (*Id.*) By allowing hybrid taxi owners to charge this extra $ 3 per shift, those owners would recoup the additional cost of changing to hybrid cars, according to the TLC. (*Id.*) [10]

To calculate the $ 12 reduction in lease rates, the TLC shifted from the capital cost of "hacking up" a vehicle to the cost of gasoline in New York City during a two-year period from December 11, 2006, to December 8, 2008, which was $ 3.05 a gallon. The TLC then compared the expected costs of gasoline per shift for a Crown Victoria and for the Ford Escape, the most popular brand of hybrid taxicab. Based on averages of 15 miles per gallon and driving 135 miles per shift, the costs in gasoline per shift would be $ 27.45 for the Crown Victoria. In the Ford Escape, which averages 34 miles per gallon, the gasoline cost is $ 12.11 per shift. The TLC rounded the price differential to $ 15, and then offset the $ 15 from the $ 3 incentive, resulting in a $ 12 downward adjustment. (*Id.* PP 28-29.)

Under the new regulations, the TLC did not consider the operating costs of the medallion owners. Instead, the TLC calibrated a cost which the owner had never borne and reduced the lease rate by that calculated value. The TLC's justification for this new

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10. The City's calculation seems to ignore the fact that the statutory life of a hybrid vehicle is five years, not three. Using the City's methodology, the proper incentive for a taxicab with a five-year life cycle would appear to be $ 1.64 per shift.

regulation: to "green" the taxi fleet with cleaner and more efficient taxicabs. The new lease cap regulations would not have been possible under the prior regulatory framework.

The TLC considered other regulatory options before enacting the Lease Cap Rules. The TLC considered requiring taxicab owners who lease their vehicles to pay for the cost of fuel, either through direct reimbursement of gas costs to drivers or by requiring Fleet Owners to deliver a vehicle with a full tank of gas at the start of each shift. (*Id.* P 33.) The TLC states that it did not promulgate this rule because it was "logistically infeasible" and difficult to enforce. (*Id.*)

IV. Procedural History

a. The Parties

The Amended Complaint, filed on April 17, 2009, alleges that the Lease Cap Rules are preempted by the EPCA and the CAA because the Rules are essentially a mandate to purchase vehicles with a certain mpg or emissions rating.

The Plaintiffs are operators of taxicab fleets (hereinafter, "Fleet Owners") and a trade association for fleet operators. The Fleet Owners regularly lease their vehicles to drivers, and the majority of the vehicles are Crown Victorias. Together, Plaintiffs control more than 25% of the taxicabs in New York City. (*See* Am. Compl. PP 7-11.) Industry-wide, fleet owners, the group

presumptively benefitting from the current structural disincentive to purchase hybrids, control approximately 35% of all taxicab medallions. (*See* Salkin Decl. P 32; May 7, 2009 Oral Argument Transcript ("Oral Arg. Tr.") 36:09-14.)

Defendants are New York City; the TLC, which is the City's regulatory agency for the taxicab industry; Mayor Michael Bloomberg, in his official capacity; TLC Commissioner, Chair, and Chief Executive Officer Matthew Daus, in his official capacity; TLC Assistant Commissioner for Safety & Emissions Peter Schenkman, in his official capacity; and TLC First Deputy Commissioner Andrew Salkin, in his official capacity.

b. The Evidentiary Hearing

The Court held oral argument on Plaintiffs' motion on May 7, 2009. Following oral argument the Court held an evidentiary hearing on May 20, 2009, to determine the effect of the Lease Cap Rules on Fleet Owners and whether the Rules force Fleet Owners to switch to hybrid vehicles.

Plaintiffs presented three experts at the May 20, 2009 hearing: James Levinsohn, an economist teaching at the University of Michigan, who presented a detailed estimation of the profit differential between Crown Victoria and hybrid owners under the status quo lease caps and under each of the first three years of the Lease Cap Rules; Ray Mundy, a transportation and logistics specialist teaching at the University of Missouri, who

discussed the history of lease caps in New York City and how tying lease caps to the use of hybrid vehicles would affect the purchasing decisions of Fleet Owners; and Dean Karlan, an economist teaching at Yale University, who testified about brand loyalty and why businesses make certain economic decisions.

Defendants presented two experts: Kurt Strunk, a senior consultant at National Economic Research Associates ("NERA"), who testified about errors in Dr. Levinsohn's economic study and concluded that so long as Fleet Owners made more than $ 1 in profits under the Lease Cap Rules, the new Rules would not "force" them to switch to hybrids; and Rachel Weinberger, a transportation planning specialist teaching at the University of Pennsylvania, who testified that the prior lease cap rules presented a structural disincentive for Fleet Owners to switch to hybrid taxicabs, but that even under the new Lease Cap Rules not all Fleet Owners would behave in the most efficient economic manner and switch to hybrid vehicles.

DISCUSSION

I. Preliminary Injunction Standard

A preliminary injunction may be granted upon a showing of irreparable harm, and because this matter involves a challenge to a New York City statutory or regulatory scheme, Plaintiffs must also demonstrate a likelihood of success on the merits. *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996). For the reasons given in

the previous decision, Plaintiffs have shown that they will suffer irreparable harm without an injunction. *See Metro. Taxicab*, 2008 U.S. Dist. LEXIS 94021, 2008 WL 4866021, at *5-7 (finding that Plaintiffs would have no private right of recovery under the EPCA). The issue for this preliminary injunction motion is whether Plaintiffs have shown a likelihood of success of the merits.

II. Likelihood of Success on the Merits

Plaintiffs argue that they are likely to succeed on the merits because the Lease Cap Rules are preempted by federal law. Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, "state laws that interfere with, or are contrary to the laws of congress, made in pursuance of the constitution are invalid." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 604, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991) (internal quotations and citation omitted). The Supremacy Clause "may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and state law." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 654, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995); *see also Mortier*, 501 U.S. at 604-05 ("Congress' intent to supplant state authority in a particular field may be express in the terms of the statute.").

Even without express preemptive language, courts may infer Congress' intent to preempt state action where "the scheme of federal regulation is sufficiently

comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)). Where a party claims that federal law preempts state action in a field traditionally occupied by state regulation, courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice*, 331 U.S. at 230. In every preemption analysis, courts must look to Congress' intent to determine the scope of the preemption. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1194, 173 L. Ed. 2d 51 (2009) ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.") (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)).

Before analyzing Congress' intent in enacting the EPCA and the CAA and whether those federal statutes preempt the Lease Cap Rules, the Court must determine whether the new rules are a *de facto* mandate to Fleet Owners to purchase hybrid taxicabs. If the Lease Cap Rules present only a single "real" option for Fleet Owners, then the Rules are a mandate and the Court will then determine if that single option is preempted. *See, e.g., Travelers Ins.*, 514 U.S. at 668 ("We acknowledge that a state law might produce such acute, albeit indirect, economic benefits, by intent or otherwise, as to force an ERISA plan to adopt a certain

scheme . . . and that such a state law might indeed be preempted . . . ."); *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 193 (4th Cir. 2007); *Retail Indus. Leaders Ass'n v. Suffolk County*, 497 F. Supp. 2d 403, 417 (E.D.N.Y. 2007). If the Lease Cap Rules present viable options to Fleet Owners to either purchase a Crown Victoria or a hybrid, then the Rules are not a mandate. A preemption analysis would then be irrelevant since the City is not forcing the Fleet Owners to take any new action—much less a potentially preempted action. *See Travelers Ins.*, 514 U.S. at 659 (noting that where a state law with some economic impact did not bind the affected parties to "any particular choice," the state law did not function as a regulation of a preempted area of law).

a. Are the Lease Cap Rules a Mandate?

i. Legal Precedent

There are no controlling cases that deal with whether the Lease Cap Rules are a mandate, and, if so, whether the Rules are preempted. Both parties cite to cases involving the Employee Retirement Income Security Act of 1974 ("ERISA"), in which the Supreme Court and lower courts have addressed the issue of preemption where a state law, while seemingly presenting choices, essentially mandates an outcome that is preempted by federal law.

In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995), a New York

state statute required hospitals to collect surcharges from patients covered by a commercial insurer, but exempted patients insured by Blue Cross/Blue Shield. *Id.* at 649. The effect of the law was to make "the Blues" a cheaper and more attractive option for administrators of employee benefit plans that fell under ERISA. The plaintiffs, who were other health-care insurers, argued that the law was preempted by language in the ERISA statute stating that ERISA superseded all state laws insofar as they "relate to" an employee benefit plan. The Court determined that the only way to understand the term "relate to" was to examine the objectives of the ERISA statute and then compare "the purpose and the effects" of the New York statute to see if they conflict. *Id.* at 656-59. The Court noted that the intent of the ERISA preemption provision was to ensure that plan administrators would work with a uniform body of law, so as to minimize the administrative and financial burden of complying with many different state directives. *Id.* at 657-58.

Examining the New York statute, the Court noted that the law created an "indirect economic effect" on plan administrators' choices, but that "[a]n indirect economic influence, however, does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself." *Id.* at 659-60. The Court found that the statute's indirect influence affected a plan administrator's decisions about which plan to use, "but it does not affect the fact that any plan will shop for the best deal it can get, surcharges or no surcharges." *Id.* at 660. In analyzing how the state law

fit with Congress' intent to preempt state regulation of ERISA plans, the Court held that "cost uniformity was almost certainly not an object of pre-emption, just as laws with only an indirect economic effect on the relative costs of various health insurance packages . . . are a far cry from those 'conflicting directives' from which Congress meant to insulate ERISA plans." *Id.* at 662. The law was not preempted because: (1) it did not force only one, preempted, choice; and (2) the manner in which the law indirectly affected ERISA plan decisions was not part of Congress' preemptive object.

Significantly, however, the Court left open an unresolved question:

> [W]e do not hold today that ERISA pre-empts only direct regulation of ERISA plans, nor could we do that with fidelity to the views expressed in our prior opinions on the matter. We acknowledge that a state law might produce such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers, and that such a state law might indeed be pre-empted . . . .

Id. at 668 (internal citations omitted). While this observation is dicta, the Supreme Court clearly recognized that the indirect economic pressures of a state law could force a party to adopt a scheme that would be preempted, even if the Court did not find such pressures in *Travelers Insurance*.

Appendix B

The Supreme Court analyzed the potentially preemptive impact of a state law operating as a *de facto* mandate in *California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997). There, a California law allowed contractors to pay lower wages to workers from state-certified apprenticeship programs when working on public works projects. *Id.* at 319-20. At issue was whether the California law affected the apprentice programs' ERISA plans by essentially forcing them to obtain a state certification, which arguably was preempted because it "relate[d] to" ERISA. The Court held that the law was not preempted by the ERISA statute because the wage law was "quite remote from the areas with which ERISA is expressly concerned—'reporting, disclosure, fiduciary responsibility, and the like.'" *Id.* at 330 (quoting *Travelers Ins.*, 514 U.S. at 661). The Court also analogized the case to *Travelers Insurance* and found that the added inducement from the lower wage paid for state-approved apprentices was not "tantamount to a compulsion upon apprenticeship programs." *Id.* at 333. The Court noted that the wage statute "alters the incentives, but does not dictate the choices, facing ERISA plans." *Id.* at 334.

The Fourth Circuit distinguished *Travelers Insurance and Dillingham Construction in Retail Industry Leaders Association v. Fielder*, 475 F.3d 180 (4th Cir. 2007), another ERISA case. In that case Maryland passed a law that targeted Wal-Mart and forced the company—and, by specifically excluding other

employers who might fall within the statute, only that company—to either spend at least 8% of its total payroll on health insurance for its employees or pay the shortfall to the state. *Id.* at 183. The Fourth Circuit examined how the Maryland regulation conflicted with the purpose of the ERISA statute, which was to permit ease of nationwide plan administration. The court held that "the only rational choice employers have under the [Maryland act] is to structure their ERISA healthcare benefit plans so as to meet the minimum spending threshold," because no reasonable employer would pay money to the state that it could instead spend on its employees. *Id.* at 193. The court looked at the Maryland legislature's intent in passing the so-called Fair Share Act and found that the intent and effect were to create a "fee or a penalty" that gave Wal-Mart "an irresistible incentive" to increase health benefits. *Id.* at 194 ("The Maryland General Assembly intended the Act to have precisely this effect.").

The Fourth Circuit distinguished the Wal-Mart case from *Travelers Insurance* and *Dillingham Construction* for several reasons. First, it said that the Maryland law directly regulated ERISA plan structuring, whereas *Travelers Insurance* and *Dillingham Construction* involved indirect regulations, so the Maryland law had a "tighter causal link between the regulation and employers' ERISA plans," making it more analogous to cases where ERISA regulation was preempted. *Id.* at 195-96. Second, the court found that the law allowed for no meaningful alternatives to increasing the payment for health insurance, and that

even if those alternatives did exist, they would still affect plan decisions in a preempted manner. *Id.* at 196-97.

Retail Industry Leaders Association v. Suffolk County, 497 F. Supp. 2d 403 (E.D.N.Y. 2007), dealt with facts nearly identical to *Fielder*. In *Suffolk County*, the local legislature targeted Wal-Mart to make health care expenditures of at least $ 3 per employee work-hour or pay the shortfall and civil penalties to the county. 497 F. Supp. 2d at 406. The court looked at the legislative history of the local act and found that "Suffolk County enacted it in order to mandate that covered employers and, specifically, Wal-Mart, increase spending on healthcare coverage." *Id.* at 417. Citing to *Fielder*, the court also found that "the alternative options for compliance with the Act are unrealistic." *Id.* at 418. Since it was a mandate, the act was preempted under ERISA because it "would disrupt uniform plan administration." *Id.*

The rule derived from these cases is that a local law is preempted if it directly regulates within a field preempted by Congress, or if it indirectly regulates within a preempted field in such a way that effectively mandates a specific, preempted outcome. This Court's initial ruling in *Metropolitan Taxicab* was an example of a local law directly regulating within a preempted field. *See* 2008 U.S. Dist. LEXIS 94021, 2008 WL 4866021, at *9. Fielder is an example of a case involving an effective mandate of a preempted outcome. *See* 475 F.3d at 193-96. Conversely, a local law is not preempted when it only indirectly regulates parties within a preempted field and presents regulated parties with viable, non-preempted

options, as held in *Travelers Insurance* and *Dillingham Construction*.

ii. Application to the Facts

The Lease Cap Rules at issue control the maximum lease rates which taxicab owners may charge. They allow a higher rate for hybrids and much lower rates for Crown Victorias. While silent on mileage and emission standards, the Rules were expressly adopted to encourage the purchase of hybrid vehicles which meet the City's mileage goals and desired emission standards.

The Court must look to the effect of the Lease Cap Rules on Fleet Owners to determine if they are a *de facto* mandate to purchase hybrid vehicles. Plaintiffs bear the burden to persuade the Court that the Rules constitute a mandate "by a clear showing." *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997) (citation omitted). While *Travelers Insurance*, *Dillingham Construction*, *Fielder*, and *Suffolk County* describe how a court should analyze the interplay between an effective mandate and preemption, they provide little guidance on how a court should determine whether specified economic incentives actually create a mandate. For this reason the Court asked the parties to present expert evidence on the effect of the Lease Cap Rules.

In his written declaration of May 18, 2009, and at the May 20, 2009 evidentiary hearing, Plaintiffs' expert economist, Dr. Levinsohn, estimated the expected

impact of the Lease Cap Rules on Fleet Owners by using financial data supplied by the Plaintiffs. Dr. Levinsohn calculated the difference in profit for Fleet Owners if they used entirely Ford Escape Hybrids compared to Crown Victorias, factoring in the comparative revenue from lease charges; the comparative cost of purchasing and hacking up a taxicab; medallion costs; the comparative operating cost; and other general administrative costs.

If the lease cap rates had remained unchanged, Dr. Levinsohn estimated that Fleet Owners using Crown Victorias made approximately $ 8,500 per year in profits, while those using hybrids earned only $ 5,100 in profits, meaning that hybrid profit was $ 3,400 less per vehicle per year. (*See* Declaration of James Levinsohn ("Levinsohn Decl.") 8-9; *see also* Plaintiffs' Ex. 31 from May 20, 2009 Evidentiary Hearing ("Pl. Hr'g Ex.").)

A chart that Plaintiffs presented at the May 20, 2009 hearing illustrates Dr. Levinsohn's findings from his analysis of two Fleet Owner operations, Gotham Yellow LLC ("Gotham") and Ronart Leasing Corp. ("Ronart"):

Appendix B

Profits Per Car Per Year

Gotham Data

*2*Under current lease		*3*Under challenged lease rates,		
*2*rates, for car		*3*for car purchased in:		
*2*purchased today				
		May 2009	May 2010	May 2011
Crown Vics	$ 8,518	$ 3,327	$ 1,511	$ 581
Hybrid	$ 5,103	$ 7,099	$ 7,099	$ 7,099
Penalty (Difference in profits)	-$ 3,415	$ 3,772	$ 5,588	$ 6,518

Appendix B

Ronart Data

*2*Under current lease		*3*Under challenged lease rates,		
*2*rates, for car		*3*for car purchased in:		
*2*purchased today				
		May 2009	May 2010	May 2011
Crown Vics	$ 4,962	$ 363	-$ 1,348	-$ 2,241
Hybrid	$ 1,617	$ 3,258	$ 3,258	$ 3,258
Penalty (Difference in profits)	-$ 3,345	$ 2,895	$ 4,606	$ 5,499

See Pl. Hr'g Ex. 31.

The Lease Cap Rules immediately increase the lease cap for hybrid taxicabs by $ 3, but reduce the lease cap rates for Crown Victorias by $ 4. The impact of this is that the profitability of using hybrid taxicabs is increased and Crown Victoria profitability is decreased. The current $ 3,415 disadvantage for hybrids changes to a $ 3,772 advantage for hybrids, under the figures for Gotham, representing a swing of close to $ 7,200.

(*Id.*) The swing under Ronart's data for the same period is nearly $ 6,250. (*Id.*) One year later, in May 2010, when the maximum lease rate for Crown Victorias is reduced by $ 8, the profits for Crown Victoria owners are reduced to approximately $ 1,500 under Gotham's data, and the hybrid advantage increases to nearly $ 5,600. (*Id.*) Finally, in May 2011, when the Lease Cap Rules reduce the rates for Crown Victorias by $ 12 per shift, the profits from Crown Victoria taxicabs are reduced to $ 581 and the hybrid advantage increases to approximately $ 6,500. (*Id.*) Under Ronart's data Crown Victoria owners operate at a loss in the second and third years of the Lease Cap Rules. (*Id.*)

In Dr. Levinsohn's opinion, the size of the profit disparity between hybrids and Crown Victorias is so great that no rational taxicab owner would choose to take such a loss in profit when the available alternative is so much more profitable.

Plaintiffs' expert on the taxicab industry, Ray Mundy, submitted a written declaration and testified that the TLC first regulated lease rates in 1996 and first set lease caps in 1997. (*See* Declaration of Ray Mundy ("Mundy Decl.") PP 26-27.) Dr. Mundy explained the detailed, cost-based analysis of changes in fleet owner profit that the TLC undertook in 2004 when implementing new lease caps and fare increases. (*Id.* PP 30-32.) Dr. Mundy also stated that in his experience in the taxi industry nationwide, he has never encountered an example of a regulatory agency decreasing a lease rate for a vehicle that was formerly

approved. (*Id.* P 34.) Had the prior regulations stayed in place, the City could not have made the cost changes it enacted. The Lease Cap Rules reduced revenues for certain types of vehicles, without regard to cost, in order to implement the City's policy choice: taxi owners should buy hybrids.

Defendants' consultant Kurt Strunk framed the "mandate" question differently than Dr. Levinsohn. According to Mr. Strunk, the Lease Cap Rules are not a mandate so long as Crown Victoria operators continue to earn any profit. (*See* Declaration of Kurt Strunk ("Strunk Decl.") 6; *see also* May 20, 2009 Evidentiary Hearing Transcript ("Hr'g Tr.") 117:04-07.) There is no reason to compare costs and revenues associated with purchasing a hybrid, he said, because the relevant data point is that Crown Victoria operators will continue to make some profit under the Lease Cap Rules. In Mr. Strunk's opinion, any amount over zero is sufficient to demonstrate that there is an economic profit and, therefore, there is no mandate. (Hr'g Tr. 117:04-07.)

Mr. Strunk admitted that it was unusual for a regulatory agency to determine ratemaking changes based on policy, rather than on a cost analysis. "Ratemaking based on cost is more common," he said; Mr. Strunk was unaware of any agencies in the United States that regulated on anything other than costs. (*See id.* 120:11-121:09.)

Defendants' transportation expert Rachel Weinberger echoed Mr. Strunk's analysis: Fleet Owners

had a reasonable choice, even under the Lease Cap Rules, because Fleet Owners could make "a reasonable return on [their] investment, which would be an economic rent greater than zero." (*Id.* 125:02-03.) Dr. Weinberger was not as critical of Dr. Levinsohn's analysis as Mr. Strunk was. ("But I do, actually, want to applaud Dr. Levinsohn. I thought he did a very nice piece of work in a very short amount of time from an academic perspective." *Id.* 123:09-11.) Nonetheless she adhered to Mr. Strunk's point: economic rents above zero cannot constitute a mandate. (*Id.* 123:12-15.) Dr. Weinberger compared the Fleet Owners' situation to her own status as a property owner; she chooses not to maximize her profits and raise the rent on her tenants because they are a known quantity and she makes an acceptable profit. (*Id.* 126:11-21.) Upon questioning by the Court, however, Dr. Weinberger acknowledged that if given an empty apartment and the choice between a tenant paying $ 100 rent and a tenant paying $ 200 rent, she would "[o]f course" choose the $ 200 tenant because she is a reasonable business person. (*Id.* 126:22-127:08.) Since Fleet Owners must purchase vehicles every year as prior purchases age out of the fleet, it would seem that the renting of the empty apartment would be the more apt analogy.

In addition to Dr. Weinberger's and Mr. Strunk's testimony that the Lease Cap Rules are not a mandate, the City contrasts data from the purchasing decisions of Fleet Owners against individual owners who drive their own taxicabs. Individual owners already pay for their own gas and thus have an incentive to purchase

hybrids. The City classifies two types of owners who drive their own vehicles: (1) those who own the vehicles but lease their medallions ("DOVs"); and (2) those who own medallions and their own vehicle and may or may not lease out the vehicle, but who also drive several shifts a year ("non-affiliation owners"). (*See* Salkin Decl. P 30-31.)

The City states that DOVs account for approximately 7,000 taxicabs, more than 50% of all cabs. Non-affiliation owners account for 3,000 taxicabs. (*Id.* P 31.) In the 16-month period from January 2008 to April 2009, vehicles purchased by DOVs were split 55% Crown Victoria and 40% hybrid or clean diesel.[11] Vehicles purchased by non-affiliation owners during that time were 47% Crown Victoria and 47% hybrid or clean diesel. Fleet Owners purchased 70% Crown Victorias and 28% hybrid or clean diesel. (*See* Pejan Decl. Ex. K.)

The City argues that since DOVs and non-affiliation owners—the parties with a greater economic incentive to purchase hybrids due to high gas prices—continued to purchase Crown Victorias even after the economic incentive to purchase hybrids existed, it proves that taxi owners will still choose to buy Crown Victorias even when confronted by a substantial economic incentive not to do so. (*See* Salkin Decl. P 37; Pejan Decl. Ex. K.) This argument is a surmise because the existing buying pattern does not reflect the $ 12 per-shift disincentive

11. The Court assumes that the remaining 5% of vehicles were wheelchair-accessible, the third category of permissible taxicabs.

the City adopted for the express policy purpose of putting more hybrid taxicabs on the street.

Based on the foregoing evidence from the testimony at the hearing and the written declarations of the parties, there is one clear conclusion to be drawn from the Lease Cap Rules, the manner in which they were adopted, and the methodology of the new regulatory architecture. The Lease Cap Rules' purpose is to incentivize the purchase of hybrids, while at the same time provide a very meaningful disincentive to the continuing use of conventionally powered vehicles. The combined effect of the lease cap changes, and even the disincentive alone, constitutes an offer which can not, in practical effect, be refused.

The City argues that the Fleet Owners cannot show irreparable harm based on the initial $ 4 reduction. But if the Fleet Owners waited for the $ 12 disincentive to take effect in 2011, the City would surely argue that the Fleet Owners were too late. The Court need not wait, however. By creating the $ 12 disincentive, the City clearly intended to send an obvious signal as to the economic consequences for continuing to stay with Crown Victorias. While the City might have addressed the structural disincentive in other ways—perhaps a larger incentive for hybrid taxi owners—it chose a $ 12 disincentive for conventional vehicles, at a weight four times the incentive for hybrids. The disincentive reduces income without any consideration of Fleet Owner costs and imposes an immediate penalty for continuing to use the same vehicle that the City mandated within this decade.

Any doubt about the City's intent in enacting the Lease Cap Rules is dispelled by looking at how the City changed the rules. TLC Rule § 1-78(e) required the TLC to find "substantial evidence of reduced operating expenses of the affected medallion owners" before it reduced maximum lease cap rates. Such a study would have taken some time, and almost certainly would not have found any evidence that operating expenses declined in the five years between 2004 and 2009. Rather than dealing with costs, which had been the guide for over a decade, the TLC changed the rules so that it "may initiate lease cap changes at any time, based on the Commission's assessment of appropriate policy considerations." *See* TLC Rule § 1-78.1(b). Using only a policy analysis, the TLC could quickly change the maximum lease caps to create a penalty for Crown Victoria operators and a benefit for drivers, regardless of any changes to Fleet Owners' operating expenses. Defendants' own expert, Mr. Strunk, acknowledged that he had never seen such a policy-based approach to ratemaking regulation in the United States. The only reasonable inference that can be drawn from the TLC's procedural maneuvering is that it intended that the substantially reduced lease cap rates for Crown Victoria owners would convince the owners to transfer to hybrid vehicles.

There is one final piece of evidence in the question of whether Fleet Owners are effectively forced to switch to hybrid taxicabs under the new rules. Based on Dr. Levinsohn's economic analysis—to which the City presents no competing analysis, only a critique of his

methodology—the Lease Cap Rules, when fully phased in, provide an economic incentive of approximately $ 5,500 to $ 6,500 per vehicle to switch to hybrids. Dr. Levinsohn calculated that profits for Crown Victoria owners are currently $ 8,500 per vehicle per year. Under the new Lease Cap Rules, Fleet Owners who continue to use Crown Victorias would forgo a profit margin up to 76% of their current profit. (*See* Levinsohn Decl. 11-12; Pl. Hr'g Ex. 31.) A sensible business person faced with such a profit reduction would choose to avoid that loss and, in this case, favor the more profitable hybrid taxicab option. *See Fielder*, 475 F.3d at 193 (discussing the "only rational choice" that an employer could make when faced with supposed options under Maryland's Fair Share Act). The City's expert, Dr. Weinberger, acknowledged as much when discussing her hypothetical economic decisions as a landlord; when faced with the option of taking substantially higher profits in rent, she "of course" would take the money. (Hr'g Tr. 126:22-127:08.)

The Court cannot accept the City's argument that any rate structure that yields more than $ 1 in profit does not "compel" or mandate a result. The taxicab industry, as much as any other industry, is profit oriented and business owners try to maximize profits. Even a first-grader who has nothing recognizes that getting $ 100 is much better than getting $ 1, even though the first-grader is better off with $ 1 than with $ 0. Given a choice, the first-grader will always take $ 100, just as the Fleet Owners will always take a profit of $ 7,100 (hybrids) over a profit of $ 580 (Crown Victorias),

the expected differential in May 2011 under Dr. Levinsohn's analysis. (*See* Pl. Hr'g Ex. 31, *supra* P. 21.)

The City's presentation of recent purchasing patterns of DOVs and non-affiliation owners is not convincing. The economic position of DOVs and non-affiliation owners is not comparable to the Fleet Owners' position. While Fleet Owners lease their vehicles out two shifts a day, every day, the TLC prohibits drivers from operating their taxicabs more than 12 consecutive hours. *See* TLC Rule § 2-23. Accordingly, DOVs and non-affiliated owners do not have as strong an incentive as the City suggests to currently switch to hybrid taxicabs because DOVs and non-affiliation owners only pay for their own gas a maximum of half of the shifts. This could explain why many DOVs and non-affiliation owners continue to buy Crown Victorias; due to the cost of purchasing and hacking up hybrid taxicabs, it may still be in their economic benefit to drive Crown Victorias. The purchasing patterns that the City presents are not strong arguments that Fleet Owners will act against their economic interests and buy Crown Victorias once the Lease Cap Rules are in effect. Far stronger evidence of likely future purchasing performance is the sharp reduction in profits directly associated with the ownership of a Crown Victoria once the Lease Cap Rules are in place.

Looking at all the evidence, it is clear to the Court that the Lease Cap Rules do not present viable options for Fleet Owners and instead operate as an effective mandate to switch to hybrid vehicles. Having decided

that the Lease Cap Rules constitute a mandate, the Court turns to the issue of preemption.

b. Preemption Under the EPCA

Preemption claims turn on Congress' intent, so the Court must review Congress' goals in enacting the EPCA and the relevant text of the provision in question. *See Wyeth v. Levine*, 129 S. Ct. at 1194; *Travelers Ins.*, 514 U.S. at 655. The Court reviewed this same issue in the previous case involving these parties. *See Metro. Taxicab*, 2008 U.S. Dist. LEXIS 94021, 2008 WL 4866021, at *8.

Congress enacted the EPCA to address the energy crisis resulting from the 1973 Mideast oil embargo. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1182 (9th Cir. 2008) (citing H.R. Rep. No. 94-340 at 1-3 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 1762, 1763-65). The goals of the EPCA are to improve motor vehicle efficiency and to "decrease dependence on foreign [oil] imports, enhance national security, achieve the efficient utilization of scarce resources, and guarantee the availability of domestic energy supplies at prices consumers can afford." *Id.* (quoting S. Rep. No. 94-516 (1975) (Conf. Rep.), *as reprinted in* 1975 U.S.C.C.A.N. 1956, 1957); *see also Green Mountain*, 508 F. Supp. 2d at 305-06. The Department of Transportation ("DOT") is charged with establishing federal fuel economy standards on a fleet-wide basis. *See* 49 U.S.C. §§ 32902(a), 32902(c). These average standards are known as "corporate average

fuel economy" or "CAFE" standards. The CAFE standard is "a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year." *Id.* § 32901(a)(6).

The EPCA contains an express preemption clause:

> When an average fuel economy standard prescribed under this chapter . . . is in effect, a State or political subdivision of a State *may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards* for automobiles covered by an average fuel economy standard under this chapter.

49 U.S.C. § 32919(a) (emphasis added). This language is quite clear: "Congress's undoubted intent was to make the setting of fuel economy standards exclusively a federal concern." *Green Mountain*, 508 F. Supp. 2d at 354.

The DOT delegates the responsibility for setting fuel economy standards to the National Highway Traffic Safety Administration ("NHTSA"). 49 C.F.R. § 1.50(f). The NHTSA must weigh four factors when setting standards: "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy." 49 U.S.C. § 32902(f). The NHTSA has interpreted "economic practicability" to include consideration of consumer choice, economic

hardship for the auto industry, and vehicle safety. *Green Mountain*, 508 F. Supp. 2d at 307. The NHTSA balances the goals of improving fuel economy with maintaining consumer choice and avoiding adverse economic effects on auto manufacturers. As a California district court described it:

> NHTSA must set fuel economy at the maximum feasible level while avoiding serious adverse economic effects on manufacturers and maintaining a reasonable amount of consumer choice among a broad variety of vehicles. Accordingly, Congress carefully drafted the CAFE program to require fuel economy restrictions that do not have the effect of either imposing impossible burdens or unduly limiting consumer choice as to capacity and performance of motor vehicles.

Central Valley Chrysler-Jeep v. Witherspoon, 456 F. Supp. 2d 1160, 1169 (E.D. Calif. 2006) (internal citations and quotations omitted).

A manufacturer's fleet of new passenger vehicles currently must average at least 27.5 miles per gallon. *See* 49 U.S.C. § 32902(b). By 2020 that minimum fleet average rises to 35 miles per gallon. *Id.* Less than a month ago President Obama proposed new CAFE standards that would require a fleet average of 35.5 miles per gallon by 2016. *See* Press Release, The White House, President Obama Announces National Fuel Efficiency Policy (May 19, 2009). There is no question

that the federal government is actively pursuing regulation that would affect national fuel efficiency standards.

The City acknowledges that the prior 25/30 Rules are preempted under the EPCA because they "related to fuel economy standards." (*See* Oral Arg. Tr. 16:13-15.) Defendants now argue that the Lease Cap Rules, even if they are a mandate, are not preempted under the EPCA because they simply designate hybrid vehicles as required taxicabs and do not require vehicles with a certain mpg rating. The City argues that the term "related to" should be construed narrowly, so that a *de facto* requirement to purchase hybrid taxicabs does not "relate to" fuel economy standards under 49 U.S.C. § 32919(a).

A constricted interpretation of the term "related to" is not appropriate. The Supreme Court just recently referred to that term as "expansive." In *Travelers Indemnity Co. v. Bailey*, Nos. 08-295, 08-307, 129 S. Ct. 2195, 174 L. Ed. 2d 99, 2009 U.S. LEXIS 4537, 2009 WL 1685625 (June 18, 2009), a case dealing with the enforceability of a Bankruptcy Court order enjoining related state court lawsuits, the Supreme Court stated unequivocally that "[i]n a statute, '[t]he phrase 'in relation to' is expansive.'" 2009 U.S. LEXIS 4537, 2009 WL 1685625, at *8 (quoting *Smith v. United States*, 508 U.S. 223, 237, 113 S. Ct. 2050, 124 L. Ed. 2d 138 (1993)). Although the Court noted that at some point the term "relate to" loses any meaning because "'everything is related to everything else,'" *id.* (quoting *Dillingham*

Constr., 519 U.S. at 335), the Court found that the state claims at issue "clearly" related to the Bankruptcy Court's injunction and so there was no need to "stake out the ultimate bounds" of the connection. *Id.*

In this case, while it is true that the Lease Cap Rules do not require a specific mpg rating, the effect of the rules is to force taxicab owners to meet an mpg threshold determined by the mileage rating of the TLC's approved hybrid or clean diesel vehicles. All of the TLC-approved hybrids or clean diesel vehicles are rated 25 mpg or higher. (*See* Saylor Decl. Ex. 14.) These are the same vehicles that the TLC approved under the preempted 25/30 Rules. (*Compare* Saylor Decl. Ex. 4 *with* Saylor Decl. Ex. 14.) The Lease Cap Rules are essentially a command to taxicab owners to meet that higher mpg standard. *See Am. Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196, 200 (2d Cir. 1998) (finding that while a New York law requiring that a percentage of vehicle sales be "zero emission vehicles" did not "impose precise quantitative limits on levels of emissions," the CAA nevertheless preempted the sales requirement because the law was "in the nature of a command having a direct effect on the level of emissions").

The City's purpose in enacting the Lease Cap Rules also sheds light on the issue of preemption. *See Travelers Ins.*, 514 U.S. at 658 (looking at the "purpose and the effects" of the New York law); *Fielder*, 475 F.3d at 190 (examining the "nature and effect" of Maryland's Fair Share Act to determine preemption). While consideration of the purpose of the local regulation is

not the end-all to the Court's preemption review, that does not mean it should be ignored. It is fair to consider purpose in conjunction with the law's effects. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) ("In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law."). Here, one of the City's stated purposes in enacting the Lease Cap Rules was to allow taxi owners who choose "a fuel efficient" vehicle to realize a greater lease income than owners who choose "a less efficient vehicle." (*See* Pejan Decl. Ex. J.) The City's discussion of "efficient" vehicles relates to how many miles per gallon a vehicle travels. Indeed, the exact amount of the disincentive is based on a calculation of miles per gallon. (*See* Salkin Decl. P 29.) Looking beyond the reasons stated in the City Record, TLC Commissioner Daus, in announcing the Lease Cap Rules, stated that, "Our goal from the beginning was to get *fuel efficient* taxis on the road using whatever appropriate methods required to achieve our goal." (*See* Saylor Decl. Ex. 8 (emphasis added).)

Focusing on the effect and purpose of the Lease Cap Rules, it is clear that the rules "relate to" fuel economy standards, as contemplated in 49 U.S.C. § 32919(a), the EPCA preemption clause. The 25/30 Rules specifically referred to mpg standards, but creative drafting and the absence of specific reference to mileage do not make the effect—or the purpose—of the Lease Cap Rules any different than the prior preempted regulations. The

Lease Cap Rules effectively mandate the use of taxicabs with a certain mpg rating. *See Cent. Valley*, 529 F. Supp. 2d at 1175 ("The narrowest interpretation consistent with the plain language of EPCA's preemptive provision is that it encompasses only those state regulations that are explicitly aimed at the establishment of fuel economy standards, or that are the *de facto* equivalent of mileage regulation . . . ."). The express language of the EPCA preemption clause and the clear message from the White House that the federal government is active within the preempted field of fuel economy standards lead to one conclusion: fuel economy standards are a federal matter and the EPCA preempts local laws, such as the Lease Cap Rules, that infringe upon the federal prerogative.

Further, the City cannot argue that the Lease Cap Rules do not "relate to" fuel economy standards because the rules burden only a small percentage of taxicab owners and only insignificantly affect the EPCA's objectives. As discussed in the previous litigation in this case, the Supreme Court foreclosed such an argument in *Engine Manufacturers*. The Court found that the aggregate effect of allowing every state or political subdivision to enact seemingly harmless rules would create an "end result [that] would undo Congress's carefully calibrated regulatory scheme." *Engine Mfrs.*, 541 U.S. at 255.

The purpose and effect of the Lease Cap Rules is to force Fleet Owners to purchase taxicabs with a certain mpg rating. Reading the language of the EPCA preemption statute, 49 U.S.C. § 32919(a), it is clear that

the Plaintiffs are likely to succeed in showing that the Lease Cap Rules are "related to" fuel economy standards and are preempted under the Supremacy Clause.

c. Preemption Under the CAA

The Clean Air Act empowers the Environmental Protection Agency ("EPA") to promulgate regulations necessary to prevent deterioration of air quality. 42 U.S.C. § 7601(a); *Cent. Valley*, 529 F. Supp. 2d at 1156. Part of the EPA's mandate under the CAA is to set standards relating to emissions from new vehicles. 42 U.S.C. § 7521(a)(1); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 452, 330 U.S. App. D.C. 1 (D.C. Cir. 1998) ("Subchapter II of the [CAA] vests in the federal government the almost exclusive responsibility for establishing automobile emission standards for new cars."). The CAA contains a preemption provision at § 209(a):

> No State or any political subdivision thereof shall adopt or attempt to enforce *any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines* . . . No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling . . . or registration of such motor vehicle, motor vehicle engine, or equipment.

42 U.S.C. § 7543(a) (emphasis added).

Appendix B

Congress preempted states—and their political subdivisions—from creating their own emissions standards for new vehicles because Congress was concerned about the possibility of 50 different standards applying to one vehicle that so easily moves across state lines. *See Engine Mfrs. Ass'n ex rel. Certain of its Members v. EPA*, 88 F.3d 1075, 1079, 319 U.S. App. D.C. 12 (D.C. Cir. 1996) ("Congress had another reason for asserting federal control in this area: the possibility of 50 different state regulatory regimes 'raised the spectre of an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers.'") (quoting *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1109, 201 U.S. App. D.C. 109 (D.C. Cir. 1979)).[12]

The question for the Court is whether the Lease Cap Rules, which effectively mandate the purchase of hybrid taxicabs, relate to the control of emissions. In

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12. Congress granted California an exception from preemption because "Congress recognized that California was already the leader in the establishment of standards for regulation of automotive pollutant emissions at a time when the federal government had yet to promulgate any regulations of its own." *Engine Mfrs. Ass'n ex rel. Certain of its Members*, 88 F.3d at 1079 (internal quotation and citation omitted). Congress later permitted other states to adopt California's standards, if the EPA granted California a waiver. *See Am. Auto. Mfrs. Ass'n*, 152 F.3d at 198 (describing regulatory history); *Green Mountain*, 508 F. Supp. 2d at 304 (same). The case in front of this Court does not deal with any exceptions to § 209(a) preemption.

the prior litigation the Court found that the 25/30 Rules did not relate to emissions standards because those rules specifically targeted fuel economy but were silent as to emissions. *Metro. Taxicab*, 2008 U.S. Dist. LEXIS 94021, 2008 WL 4866021, at *14. This case is different. One of the stated purposes of the Lease Cap Rules is to "create incentives for taxicab owners to buy cleaner vehicles." (*See* Pejan Decl. Ex. J.) Additionally, the rules reduce the maximum lease cap for "owners of less clean taxicabs." (*Id.*) While the enjoined 25/30 Rules specifically did not target emissions, it is clear that one purpose of the Lease Cap Rules is to affect taxicab emissions by mandating the purchase of "cleaner vehicles."

As discussed earlier in the section on EPCA preemption, *see* Discussion Section II(b), *supra* pp. 31-32, the purpose of a regulation alone is not enough to create preemption; courts must also examine the effect of a local rule when conducting a preemption analysis. *See Travelers Ins.*, 514 U.S. at 658 (examining "purpose and the effects"); *Fielder*, 475 F.3d at 190 (examining the "nature and effect"). In *American Automobile Manufacturers Association v. Cahill*, the Second Circuit discussed a New York law requiring that a percentage of cars sold be "zero emission vehicles," or "ZEVs." 152 F.3d at 197. The court looked at the regulation's purpose and effect, and found that even though the ZEV requirement did not impose a precise limit on emissions levels, the sales regulation was preempted because it had the purpose of "effect[ing] a general reduction in emissions" and was "in the nature

of a command having a direct effect on the level of emissions." *Id.* at 200.

The case here is not unlike *American Automobile Manufacturers Association*. The Lease Cap Rules have a purpose of reducing emissions from taxicabs. The Court has already found that the rules are effectively a mandate requiring the purchase of hybrid taxicabs. Similar to what the Second Circuit reasoned when looking at the ZEV sales requirement, a requirement to purchase hybrid taxicabs is also a command that would directly affect the level of emissions. This is certainly the City's goal in enacting the Lease Cap Rules, and reducing emissions would be its result. Section 209(a), the CAA preemption provision, specifically reserves emissions regulation for new vehicles to the federal government. As discussed earlier, even though the effect of the Lease Cap Rules on nationwide regulation and vehicle production will be minor, the aggregate effect of permitting such local regulation would create an "end result [that] would undo Congress's carefully calibrated regulatory scheme." *Engine Mfrs.*, 541 U.S. at 255.

Engine Manufacturers is instructive in another aspect. The Court there held that the CAA preempted local rules requiring fleet operators to use "alternative-fuel vehicles" or vehicles that met certain emission specifications. *Id.* at 259. With almost no discussion, the Court assumed that regulations requiring "alternative-fuel vehicles" related to the control of emissions under the CAA's preemption statute. *Id.* at 249-52. The only

issue before the Court was whether preemption under the CAA applied equally to laws addressing purchasers of vehicles as well as manufacturers or dealers. *Id.* at 248-49. The Court did not specify why a mandate to use "alternative-fuel vehicles" meant that the vehicles were of a type that related to emissions control. In two footnotes, the Court defined "alternative-fuel vehicles" as, essentially, vehicles not powered by gasoline or diesel fuel. *See Id.* at 249-50 n.1, 2.

Here, § 3-03.1 of the TLC Rules defines a hybrid vehicle as a "commercially available mass production vehicle originally equipped by the manufacturer with a combustion engine system together with an electric propulsion system that operates in an integrated manner." The City argues that the definitions for "alternative-fuel vehicles" that the Court in *Engine Manufacturers* assumed without discussion were related to emissions standards are unlike the definition for hybrid vehicles in the City's rules. Exact parity between the two definitions, however, is not required. It is a matter of common sense that a rule with the stated purpose of increasing the number of "cleaner vehicles" and with the effect of requiring the purchase of hybrid taxicabs is a rule "relating to the control of emissions." 42 U.S.C. § 7543(a). The Supreme Court in *Engine Manufacturers* did not need testimony from scientific experts to explain the connection between "alternative-fuel vehicles" and emissions regulation. Neither does this Court need further testimony to understand the close relation between hybrid vehicles and emissions.

The Lease Cap Rules effectively force Fleet Owners to purchase hybrid taxicabs, and the purpose and effect of the rules is to reduce emissions.[13] CAA § 209(a) preempts New York City from enacting regulations related to emissions control, and the Plaintiffs have demonstrated a likelihood of success in proving such preemption.

CONCLUSION

For the reasons previously stated, the Court finds that the Lease Cap Rules are a *de facto* mandate upon the Plaintiffs to purchase hybrid vehicles. The Court further finds that the Plaintiffs have demonstrated irreparable harm and a likelihood of success in showing that such a mandate is preempted by the EPCA and the CAA. The Lease Cap Rules relate to fuel economy and emissions regulation, which are substantially federal concerns. Accordingly, the Plaintiffs' motion for a preliminary injunction is GRANTED.

Dated: New York, New York
June 22, 2009
SO ORDERED
/s/ Paul A. Crotty
PAUL A. CROTTY
United States District Judge

13. The Court also noted earlier in this Opinion & Order that the purpose and effect of the Lease Cap Rules is to establish minimum mpg standards for taxicabs, *See generally* Discussion Section II(b). There is no logical problem in finding that the Lease Cap Rules have the purpose and effect of promoting both mpg and emissions standards. Even a casual reading of the City's public pronouncements and the regulatory record demonstrates that the City had both goals in mind.

No. 10-618

Supreme Court, U.S.
FILED
JAN 24 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CITY OF NEW YORK, *et al.*,

Petitioners,

v.

METROPOLITAN TAXICAB
BOARD OF TRADE, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF IN OPPOSITION

RICHARD D. EMERY
Counsel of Record
EMERY CELLI BRINCKERHOFF
& ABADY LLP
ELIZABETH S. SAYLOR
75 Rockefeller Plaza, 20th Fl.
New York, New York 10019
(212) 763-5000
remery@ecbalaw.com

Counsel for Respondents

January 24, 2011

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Did the Second Circuit err when it affirmed a preliminary injunction, holding that the preemption provision of the Energy Policy and Conservation Act likely prohibited adoption of taxi fleet vehicle rules which were indistinguishable in purpose and effect from predecessor regulations that petitioners *conceded* were preempted under that statute – and which the district court determined, after an evidentiary hearing, imposed a "de facto mandate" that was "essentially a command to taxicab owners to meet [a] higher mpg standard"?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents Metropolitan Taxicab Board of Trade, Midtown Car Leasing Corp., Bath Cap. Corp, Ronart Leasing Corp., Geid Cab Corp., Linden Maintenance Corp., and Ann Taxi Inc. do not have parent corporations and there is no publicly held company that owns 10% or more of their stock.

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PROVISIONS INVOLVED

In addition to Energy Policy and Conservation Act ("EPCA") provision and the challenged rules set forth in the petition (Pet. 1-2), the rescinded predecessor to the challenged rules and the Clean Air Act's ("CAA") preemption provision are also relevant to this action:

> Rules of the City of New York tit. 35 § 3-03(c)(10)-(11) (JA31-32)
>
> 42 U.S.C. § 7543(a)
>
> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines. . . .

STATEMENT OF THE CASE

A. INTRODUCTION

Petitioners and amici seek review of the Second Circuit's decision in order to decide the limits EPCA's express preemption provision imposes on programs at the state and local level that provide incentives to purchase more fuel efficient automobiles. But petitioners freely concede that no other court of appeals has decided that question, let alone done so in a manner that even allegedly conflicts with the decision below. Indeed, no appellate court has construed

EPCA's preemption provision (and no district court has invalidated an incentive).

In fact, the question whether EPCA preempts incentives is not at issue in this case. The district court enjoined the challenged rules ("Replacement Rules") after determining that they were indistinguishable in purpose and effect from predecessor rules ("Rescinded Rules" or "25/30 MPG Rules"), which had explicitly mandated the purchase of vehicles with a fuel economy rating of at least 25 miles per gallon ("mpg"). Petitioners have now *expressly conceded* that the Rescinded Rules were preempted under EPCA. The district court held that the Replacement Rules amounted to a de facto mandate and that the differences between the two sets of rules reflected only "procedural maneuvering" and "creative drafting." The court also found pretextual petitioners' assertion that the Replacement Rules were "police power" regulations aimed at adjusting driver incomes.

Although the Second Circuit decision affirming preliminary relief did not rely on the de facto mandate finding – concluding instead that the Replacement Rules were preempted because they referenced fuel economy standards – the Second Circuit did not overturn or question that finding. (Nor did it disturb the district court's holding that the Replacement Rules were also preempted by the CAA.) The court even highlighted that petitioners continue to operate incentives for hybrid taxis, without any suggestion of disapproval.

Petitioners' assertions that the Second Circuit struck down all incentive programs therefore depend on an unsupported reading of the decision that is utterly abstracted from the facts and procedural history of this case. As is clear from the decision below – and as other courts have had no difficulty recognizing – the Second Circuit did not invalidate all incentives or purport to. Far from taking preemption to the furthest reaches, the court's decision stands for the unremarkable proposition that a local rule that is concededly preempted may not be revived by re-drafting it to omit particular words. No principle of preemption law would support a different conclusion.

Petitioners and amici primarily criticize what they take to be the Second Circuit's *reasoning*, predicting that the reasoning will lead to undesirable effects. This Court, however, reviews judgments – not opinions. In any event, those criticisms lack merit. The Second Circuit applied settled principles. Indeed, it is the petitioners' account that neglects the text and purpose of the preemption provision.

Notably, petitioners do not ask the Court to review or overturn the *judgment* in this case on either of the grounds it was issued – EPCA or CAA. The only relief requested is a remand for the court of appeals to determine whether the district court committed clear error when it held that the Replacement Rules "effectively mandate" the purchase of fuel efficient vehicles. (Petitioners have conceded that an "effective mandate" is preempted.) A decision by this Court therefore would be essentially advisory.

Even if the Court were persuaded of the need to address the complex, novel and abstract question purportedly presented without any further development in the lower courts, the singular facts and circumstances of this case would make it an obviously inappropriate occasion for doing so. The Court should await a case involving preemption of what the parties agree is (or the Court at least viewed as) a simple incentive. Consideration of this case also likely would require deciding the significance of "circumvention" and post-injunction reenactment, as well as the significance of the fact that petitioners expressly conceded that the Rescinded Rules were preempted. Given the multiplicity of different and difficult case-specific issues raised, the prospect that the Court could or would reach the larger questions here, let alone "bring clarity," is infinitesimal.

B. THE ENJOINED AND RESCINDED FIRST VEHICLE RULES

In December 2007, the New York City Taxi & Limousine Commission ("TLC"), citing the City's interest in reducing air pollution and dependence on fossil fuel, adopted rules requiring that all newly purchased fleet taxis have a minimum "city" fuel economy rating of 25 mpg by October 1, 2008 and a minimum rating of 30 mpg by October 1, 2009. Prior to that, the City had never set fuel economy or emissions standards for taxi fleets. The only vehicles

qualifying under the 25/30 MPG Rules were ones with hybrid or "clean diesel" engines.[1]

Respondents, owners and an owners' trade group, brought suit contending, among other things, that the 25/30 MPG Rules violated the EPCA preemption provision, which prohibits localities from adopting laws "related to fuel economy standards or average fuel economy standards for automobiles," 49 U.S.C. § 32919(a), as well as the preemption provision of the CAA, 42 U.S.C. § 7543(a).

The district court agreed with plaintiffs, granting preliminary injunctive relief. *Metro. Taxicab Bd. of Trade v. City of New York*, No. 08-7837, 2008 WL 4866021 (S.D.N.Y. Oct. 31, 2008) ("*MTBOT I*"). The City did not appeal that ruling, and it has conceded that the 25/30 MPG Rules were preempted. App. 56a; JA661.

C. THE REPLACEMENT RULES

Within months of the district court's decision, the TLC announced an ostensibly "new" set of rules, which, rather than mandating that owners purchase the high-mpg taxis, instead relied on "incentives" and "disincentives" to "induce" (JA99) them to do so. Rules

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[1] Because almost all the qualifying vehicles were hybrids, that term is used here, as in the opinion below, to encompass those with "clean diesel" engines.

of the City of New York tit. 35 § 1-78(a)(3) ("Replacement Rules"). Specifically, the Replacement Rules set the maximum lease rate fleet owners could charge drivers for the disfavored vehicle types at $30 per day below that for vehicles that met the fuel efficiency criteria. (This disparity resulted from a $12-per-shift reduction for those leasing out conventionally-powered vehicles and a $3 increase for those purchasing – and leasing – hybrids. Only the $12 penalty was challenged.)

Adoption of this regime required the TLC to rescind its own longstanding rule against "lower[ing] any upper limitation of lease rates . . . unless . . . the record . . . includes substantial evidence of reduced operating expenses of the affected medallion owners." JA58-59 (rescinded § 1-78(e)). The TLC conceded it did not consider owners' costs in reducing these rates, and the only evidence before the Commission showed increased costs.[2]

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[2] At the same time the TLC imposed this lease cap reduction, it also reduced the cap for all vehicles by shifting the cost of sales taxes from drivers to owners. Respondents challenged both actions in state court, alleging that failure to consider cost when setting rates contravenes state law. That claim did not succeed in the lower courts, but the New York Court of Appeals recently granted review to decide, *inter alia*, whether "a government regulatory agency charged with setting rates [may] do so without any regard to the costs borne by the companies it regulates?" *Metro. Taxicab Bd. of Trade v. Taxi and Limousine Comm'n*, No. 110594/09. On account of the federal court's injunction, the Rescinded Rules are no longer directly at issue in

(Continued on following page)

Nor, for that matter, was concern for costs *to drivers* a significant impetus. Months earlier (when gas prices hovered at historic highs and fleets were almost uniformly comprised of fuel-hungry Ford Crown Victoria sedans), the TLC had refused drivers' request for a gas surcharge, on the ground that the existing lease rates already "met and surpassed" its "goal of creating a living wage for drivers." JA501.

Rather, as City officials repeatedly emphasized, the "'goal'" of the Replacement Rules remained what it had been "'from the beginning'" "'to get fuel efficient taxis on the road using whatever appropriate methods required.'" App. 17a (quoting press release). As with their predecessor, the Replacement Rules' stated "[n]umber one" purpose was "to promote hybrids and cleaner vehicles." JA145. The City described the Replacement Rules as "'another way'" to reach the same goal and as a means to overcome the "'speed bump'" the district court's preemption decision represented. App. 18a, 17a (quoting press release). While the Replacement Rules removed the explicit reference to "miles per gallon," their avowed purpose was to "induce" (JA99) the same result, and precisely the same vehicles that had been required (and prohibited) under the prior regime were subject to "incentives" and "disincentives" under the new one. App. 11a, 57a.

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that proceeding. A favorable decision, however, would likely invalidate them.

D. THE SECOND PRELIMINARY INJUNCTION MOTION

Respondents amended their complaint, claiming that the Replacement Rules were not meaningfully different from the ones they replaced and were therefore preempted.

After initial briefing and oral argument, the district court conducted an evidentiary hearing to determine "whether the new lease cap rules provide 'meaningful alternatives' to taxicab owners or whether the rules leave owners with only one 'rational choice.'" JA12 (citation omitted). In response, plaintiffs presented testimony of three experts, including James Levinsohn, a University of Michigan economist, who had undertaken a sophisticated economic analysis of how owners' profits would be affected by the Replacement Rules.

Levinsohn concluded that the "choices" offered owners under the Replacement Rules were illusory. One fleet, he explained, would earn only $581 per year per Crown Victoria taxi but more than $7,000 (12 times more) were it to purchase a hybrid. Another fleet would face a "choice" between *losing* $2,241 annually per Crown Victoria or a $3,258 profit per hybrid. Using highly conservative assumptions, Levinsohn determined that owners who continued to operate Crown Victorias would suffer, at a minimum, a 65 to 75% decline in profits.

Petitioners presented two experts who took issue with Levinsohn's conclusion – on conceptual, rather

than empirical grounds. (Neither had conducted an independent economic analysis.) They maintained that so long as a fleet operator could make even $1 leasing the disfavored vehicles, the Replacement Rules should not be described as an "effective mandate" to purchase fuel-efficient vehicles.

E. THE DISTRICT COURT'S RULING

On June 22, 2009, the district court issued a 50-page opinion and order granting preliminary injunctive relief. App. 14a-65a. The court began by underscoring that the case *did not* concern whether the City could mandate the purchase of taxis that meet certain mileage or emissions standards – because "the City has conceded that it [could not]." *Id.* 20a. Nor, the court continued, was it about "whether New York City can incentivize the purchase of certain types of taxicabs," noting three such regulations that had been implemented without challenge: (1) a 2003 rule limiting certain new taxi licenses to hybrids; (2) a 2006 rule extending the service life of hybrid taxis from three to five years; and (3) the $3 per-shift increase adopted along with the challenged $12 penalty. App. 20a. The district court reiterated its view that the central issue was whether "the new lease cap regulations have the preempted effect of mandating that taxicab owners purchase only taxicabs with hybrid or clean diesel engines." *Id.* 20a.

After examining the relevant caselaw, the court explained that under both EPCA and CAA, a local

law is preempted if, *inter alia*, it "effectively mandates a specific, preempted outcome." *Id.* 40a. Rejecting "the City's argument that any rate structure that yields more than $1 in profit does not 'compel' or mandate a result" (*id.* 51a), the court found that the Replacement Rules "effectively force Fleet Owners to purchase hybrid taxicabs" (*id.* 65a). The district court explained:

> The combined effect of the lease cap changes, and even the disincentive alone, constitutes an offer which cannot, in practical effect, be refused. . . . Looking at all the evidence, it is clear to the Court that the Lease Cap Rules do not present viable options for Fleet Owners and instead operate as an effective mandate to switch to hybrid vehicles.

Id. 49a, 52a.

The court also viewed the "TLC's procedural maneuvering" as evidence that it "intended" to compel owners to purchase hybrids. *Id.* 50a. The district court underscored, *inter alia*: (1) that the Replacement Rules would have been impermissible under the TLC's own longstanding rules tying lease cap changes to operating costs; (2) that the City's expert admitted that he had never seen a ratemaking regime that did not require the regulatory agency to consider costs; and (3) that by reducing lease rates to reflect a cost that owners had never borne, the Replacement Rules amounted to "an immediate penalty for continuing to use the same vehicle [Crown Victoria] that the City mandated within this decade." *Id.* 29a, 49a.

The history of the case and the public statements of New York City's Mayor and other officials also reinforced the court's conclusion that the purpose of the Replacement Rules was to mandate hybrids. *Id.* 15a-22a (quoting officials' statements at length). And the court also cast doubt on the City's assertion that the Replacement Rules were concerned with equalizing driver income, noting both the TLC's recent rejection of a fuel surcharge (*id.* 28a n.9), and the testimony of plaintiffs' expert as to ways the new regime would contribute to, rather than alleviate, income disparities among drivers.[3]

After determining that the Replacement Rules are a de facto mandate to purchase hybrids, the district court turned to the questions of whether the Replacement Rules are "related to" fuel economy standards under the EPCA and to the control of emissions under the CAA. *Id.* 22a. The court held that the absence of a textual reference to mileage in the Replacement Rules was merely a result of "creative drafting." *Id.* 58a. The district court relied primarily on four facts in reaching this conclusion:

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[3] For example, under the Replacement Rules, the 26 mpg hybrid Malibu garners a $15 higher lease rate than the 22 mpg gasoline-powered Ford Transit Connect, even though the actual gas savings are less than $3. (Respondents had agreed to stop purchasing the Crown Victoria if the TLC would approve for use the Transit Connect, a relatively "clean" vehicle that Ford recently developed for the taxi market. Petitioners would not approve the Transit Connect because it is rated at less than 25 mpg.)

(1) "All of the TLC-approved hybrids or clean diesel vehicles are rated 25 mpg or higher," and "[t]hese are the same vehicles that the TLC approved under the preempted 25/30 Rules" (*id.* 57a); (2) one of the stated purposes of the Replacement Rules in the City Record "was to allow taxi owners who choose 'a fuel efficient' vehicle to realize greater lease income than owners who choose 'a less efficient vehicle,'" (*id.* 58a); (3) "the exact amount of the disincentive [was] based on a calculation of miles per gallon," (*id.*); and (4) the TLC Chair had stated, "'Our goal from the beginning was to get *fuel efficient* taxis on the road using whatever appropriate methods required to achieve our goal.'" *Id.* (emphasis added by the court).

Based on this evidence, the district court concluded that respondents were likely to succeed in showing that the Replacement Rules are preempted as "related to" fuel economy standards under the EPCA. *Id.* 56a. Relying on the stated purpose of the Replacement Rules, their practical effect, and petitioners' public statements, the court also held that respondents were likely to succeed on their CAA preemption claim. *Id.* 61a-64a.

F. THE SECOND CIRCUIT'S RULING

The court of appeals affirmed. *Id.* 1a-13a. The court began by setting forth the history of the case, explaining that the Replacement Rules were adopted in the immediate aftermath of the decision holding the 25/30 MPG Rule preempted. *Id.* 3a-5a. The court

underscored that the case concerned only the $12 reduction – not the $3 incentive. *Id.* 5a. The Second Circuit also noted that the City did not contest the record evidence showing that the Replacement Rules would lower profits by 65% to 75% on each Crown Victoria. *Id.* 5a, 6a.

The court then set forth the applicable legal framework, stating that because preemption claims "'turn on Congress's intent,'" courts start "'with the text'" of a preemption provision and "'move on, as need be, to the structure and purpose of the Act in which it occurs.'" *Id.* 8a (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). To interpret the term "related to" in the EPCA preemption provision, the court of appeals looked to this Court's decisions in ERISA preemption cases, because that statute also displaces state and local laws "related to" the subject of federal law. App. 8a. Quoting from *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 324-25 (1997), the court of appeals held that determining "whether a state law relates to a preempted subject matter requires examining whether the challenged law contains a 'reference' to the preempted subject matter or makes the existence of the preempted subject matter 'essential to the law's operation.'" App. 8a (quoting 519 U.S. at 324-25). If the law does neither, it may still be preempted if it "contains requirements that amount[ ] to connection[s] with the preempted subject matter." App. 8a n.4 (quoting

Dillingham, 519 U.S. at 328 and *Travelers*, 514 U.S. at 658) (internal quotations omitted; alterations in original).

Under these standards, the court of appeals held the Replacement Rules were preempted because they "directly reference fuel economy standards" and thus "directly regulate the relevant preempted subject matter." App. 11a-12a. The court held that in the context of this case "'hybrid' is simply a proxy for 'greater fuel efficiency.'" *Id.* 11a. In support of that conclusion, the court noted, *inter alia*, that: (1) the City's list of approved vehicles under the "new" rules was identical to the one under the enjoined and concededly invalid 25/30 MPG Rules; and (2) the City admitted that the Replacement Rules were intended to improve fuel economy. *Id.* 10a-11a.

Because this conclusion was sufficient to affirm the district court's decision, the court found it unnecessary to explore the economic impact of the Replacement Rules, or reach CAA preemption. *Id.* 11a-12a. The court did not, however, question the district court's "effective mandate" finding or its CAA preemption conclusion.

REASONS FOR DENYING THE PETITION

The Second Circuit's decision, affirming a grant of preliminary injunction, does not warrant further review. It does not conflict with the decision of any circuit court or any precedent of this Court. Indeed,

petitioners concede that no other appellate decision has even interpreted the provision at issue.

Notably, petitioners do not ask this Court to overturn the judgment of the court of appeals. They ask only that this Court remand the case so that the court of appeals can decide whether the Replacement Rules amount to an effective mandate. But the district court already found, after an evidentiary hearing, that the Replacement Rules are a de facto mandate *and* that they are substantively identical to the Rescinded Rules that the City has conceded are preempted. Petitioners' claim relies on a conundrum and would require that this Court accept that Congress meant to allow localities to adopt regulations that are essentially identical, in both purpose and effect, to ones concededly preempted under federal law. And even a decision in petitioners' favor on that improbable claim would be of entirely academic significance – unless they could further persuade the court below to overturn the district court's factual findings *and* to reverse its conclusion that respondents were likely to succeed on an independent basis that petitioners do not ask the Court to consider.

As other courts have grasped, the Second Circuit's interlocutory decision here simply did not announce – and did not purport to announce – the sort of sweeping, categorical rule petitioners and amici ascribe. Their exaggerated criticisms betray a basic unfamiliarity with this case's actual facts and procedural history. Claims that this decision places "at risk" measures that are neither "proxies" for fuel

economy regulation nor "effective mandates" simply ignore that both defects were found here. Indeed, to the extent there develops a genuine need for this Court's guidance as to the limits, if any, EPCA places on local government efforts to adopt genuinely voluntary incentive measures, this case represents an especially inappropriate occasion to provide it.

I. THE SECOND CIRCUIT'S INTERPRETATION OF EPCA'S PREEMPTION PROVISION IS CORRECT AND DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT

A. The Decision Is Fully Consistent With Governing Law and Does Not Even Colorably Conflict With The Decision of Any Other Court

Petitioners do not even allege a decisional conflict as to the meaning of the EPCA provision they ask the Court to decide. On the contrary, the petition candidly acknowledges that "the Second Circuit is the first federal court of appeals [even] to interpret the EPCA preemption provision." Pet. 29. Indeed, not only has the development of EPCA preemption law so far been limited to the district court level, but the handful of courts to consider incentives have upheld them (after expressly distinguishing this case). *Infra* III. Although this Court does not strictly confine exercise of its certiorari jurisdiction to questions that have divided appellate courts, the prospect of its being in the vanguard of "a new area of developing law" (Pet.

29), is ordinarily a strong reason against, rather than in favor of, review.

Unable to identify any circuit split (or appellate authority of any kind) involving the EPCA provision, petitioners posit a "conflict" between the decision here and "the framework of analysis employed by" other circuits interpreting ERISA's preemption provision, which also uses the phrase "related to." *Id.* 9; *see also id.* 8, 9 (accusing Second Circuit decision of "non-adherence with this Court's jurisprudence" to a "degree that should not be tolerated").

There is obvious, unexplored, tension between petitioners' criticism of the court for relying overly on text at the expense of statutory purpose and their claims of "conflict" with decisions involving an entirely different (though similarly-worded) federal statute. In any event, petitioners' claims of "analytical framework" conflict – not to mention their suggestion of judicial impudence – are entirely without merit.

One of the supposedly "conflicting" circuit court ERISA decisions held that the challenged measure *was* preempted. And the two that found no preemption did not sustain a measure (1) that was adjudged only cosmetically different from a predecessor *conceded to be preempted*; or (2) found by a court to be a "de facto mandate" – let alone both, as is the case here.

The decision here set forth the same legal standards as does the petition. The court of appeals stated that because preemption claims "'turn on Congress's

intent,'" its inquiry must start "'with the text'" and "'move on, as need be, to the structure and purpose of the Act in which it occurs.'" App. 8a (quoting *Travelers*, 514 U.S. at 655). To determine the meaning of "related to" in EPCA's preemption provision, the court looked to this Court's ERISA preemption decisions in *Dillingham* and *Travelers* – the same principal ones relied upon by petitioners.

Indeed, the decision carefully hewed to the "analytical framework" set out in *Dillingham* for determining "related to" preemption: state law is displaced "if it [1] has a connection with or [2] reference to" the federally regulated subject matter. 519 U.S. at 324 (alteration in original; internal quotation marks and citations omitted). *Cf.* Sup. Ct. R. 10. ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

The court of appeals here concluded that the Replacement Rules were preempted because they "reference" fuel economy standards – that is, they rely on the distinction between hybrid and non-hybrid vehicles that, under these circumstances, was a mere proxy for fuel-economy standards. App. 9a-11a. *See Dillingham*, 519 U.S. at 325 (A law has an impermissible "reference" to a preempted subject matter when the law "acts immediately and exclusively" in the preempted area or "where the existence of [the preempted subject matter] is essential to the law's operation").

Because the Replacement Rules failed under the "reference" prong, the court did not need to determine whether the Replacement Rules *also* suffered from an impermissible "connection with" fuel economy standards (or whether, as the district court held, they were also unenforceable under the CAA). *See Travelers*, 514 U.S. at 668 (a law that makes no prohibited reference is nonetheless preempted if it "produce[s] such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme").

Neither this result nor the reasoning conflicts in the least with the Fourth, Sixth, and Ninth Circuit decisions the petition cites. Although each of these "determine[d] whether the challenged laws mandated, or effectively mandated, something within the area that Congress intended to exclusively control" (Pet. 18), this Court has nowhere suggested, let alone "required" (*id.* 16), that the two prongs of ERISA preemption be considered in any particular sequence, or that both be considered in every case. *See Dist. of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130 (1992) (holding law that "specifically refer[red] to welfare benefit plans regulated by ERISA" preempted "on that basis alone"); *Retailer Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 193 n.2 (4th Cir. 2007) (declining to reach the "reference to" preemption claim because it had already found an impermissible "connection with" the preempted area); *Associated Builders & Contractors v. Mich. Dep't of Labor & Econ. Growth*, 543 F.3d 275, 281 (6th Cir.

2008) (noting parties' agreement as to no "reference" and therefore considering only "connection" issue); *cf. Golden Gate Rest. Assoc. v. City and County of S.F.*, 546 F.3d 639 (9th Cir. 2008) (holding challenged law not preempted after exonerating it under both prongs).

Thus, the Second Circuit's "fail[ure]" to reach whether the Replacement Rules constituted an effective mandate – after it had already found preemption due to the impermissible "reference" – could not possibly be described as error. *See* Pet. 19.

Of course, petitioners' unsupported claim as to how the Second Circuit "should have" structured its preemption analysis (*id.* 19) is all the more startling given the circumstances of this case. The district court had made extensive findings, after an evidentiary hearing, that these Replacement Rules *do* "effectively mandate the use of taxicabs with a certain mpg rating." App. 59a.

Notably, petitioners do not ask this Court to review that determination, which was the basis for the district court's judgment and was not disturbed on appeal. The only relief petitioners ask from this Court is a remand for the court of appeals to decide whether the district court committed clear error. This is one of many reasons that a decision of this Court *in petitioners' favor* would be of scant practical significance.

B. The Second Circuit Correctly Decided The Preemption Question This Case Actually Presents

Petitioners and amici offer an array of disconnected criticisms of the Second Circuit's opinion below. Petitioners complain that the court of appeals erred in "examin[ing] only the text of the provision in question" and did not take sufficient account of legislative purpose, the "nature of the effect of the [Replacement Rules]," or the "presumption against preemption." Pet. 10-11.

These abstract claims fail on their own terms, but in this case, all arguments against preemption quickly reach the same dead end: the fact that the regulations at issue are identical in purpose and effect to ones petitioners expressly conceded were preempted under EPCA. Nothing petitioners and amici say (or could say) about the text or purpose of EPCA, or preemption law generally, explains why Congress would have intended that states and localities be able to re-adopt and enforce the very same measures held properly preempted (and enjoined). In providing for preemption, Congress presumably was concerned about matters of substance, rather than the draftsmanship of local regulations, and may be expected to be especially disapproving of efforts to circumvent the effect of its own preemption mandates, particularly if done in response to a valid federal court order. *Cf. Lane v. Wilson*, 307 U.S. 268, 275 (1939) (regime revised in response to prior decision "partake[s] too much of the infirmity of the

[previously invalidated regime] to be able to survive"). And in considering the "nature of the effect" of the challenged rules, the court below necessarily recognized this central fact. A contrary ruling in this case would permit the City (and all cities) to evade congressionally-intended preemption simply through "creative drafting." *See* App. 58a.

Petitioners and their amici's extravagant claims about the error and importance of the decision here disregard the actual facts and procedural history of this case. The decision did not hold – or suggest – that local laws are preempted "*whenever* [they] rely on a distinction between hybrid and non-hybrid vehicles." *See* Pet. 8 (emphasis added). The court's conclusion that hybrid is a proxy for fuel efficiency standards was "*for purposes of the new rules*." App. 10a (emphasis added). *See Cohens v. Virginia*, 19 U.S. 264, 399 (1821) ("General expressions, in every opinion, are to be taken in connection with the case in which those expressions are used."). As both courts recognized, every vehicle listed for "incentives" under the Replacement Rules has at least a 25 mpg rating, and every vehicle penalized has a less-than-25 mpg rating. App. 11a, 57a. As the district court explained, this was no coincidence. The $15 lease rate differential was itself derived from a mpg calculation. *Id.* 58a. And petitioners' public statements, as well as the history of the litigation, made clear that the Replacement Rules' purpose was to effectively mandate the purchase of vehicles meeting the fuel economy standards set in the Rescinded Rules. *Id.* 15a-22a.

Given that the Replacement Rules favor the *exact same vehicles* that were mandated under the concededly-preempted 25/30 MPG Rules, the court's holding that the Replacement Rules impermissibly "referenced" fuel economy standards is unassailable.

Claims that the Second Circuit's "view" would strike down any law "that affects, or reflects any concern regarding, automobile fuel economy" are likewise unsupportable. *See* Public Citizen Br. 9. Nor did the court anywhere suggest that "every taxicab regulation that affects a fleet owner's vehicle purchase decisions," would be invalid. Pet. 14. Indeed, the district court stated in so many words that this case *does not* concern "whether New York City can incentivize the purchase of certain types of taxis," pointing out that three City hybrid incentives remain in place: (a) the $3 hybrid incentive passed at the same time as the $12 penalty; (b) a 2003 rule limiting certain new taxi licenses to hybrids; and (c) a 2006 rule extending the service life of hybrid vehicles from three to five years. App. 20a. The court of appeals affirmed that judgment and "view" about the $3 hybrid incentive. *Id.* 5a.

Moreover, after an evidentiary hearing, the district court found that the Replacement Rules, while styled as "incentives," create a "de facto mandate" to purchase vehicles with a 25 mpg rating or higher. *Id.* 65a, 59a; *accord id.* 57a (The Replacement Rules are "essentially a command to taxicab owners to meet that higher mpg standard."). Indeed, there is a faintly Orwellian cast to describing a measure with

the purpose and effect of making operation of lower-mpg vehicles commercially infeasible as merely "removing disincentives." *See* Public Citizen Br. 9 (citing DOJ C.A. Br. 2-3).

The district court also considered – but rejected as pretextual – petitioners' claim that this was an exercise in regulating the relative incomes of drivers. App. 28a n.9. Thus, petitioners' assertion that the decision restricts their "traditional police power" is meritless.

Unable to argue that the judgment below was wrong, petitioners and their amici spend considerable time critiquing the court of appeals' reasoning. This Court, however, "reviews judgments, not opinions." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 & n.8 (1984); *accord Texas v. Hopwood*, 518 U.S. 1033 (1996) (Ginsburg, J., respecting denial of certiorari) (same). In any event, it is petitioners and amici – not the Second Circuit – who misunderstand preemption law generally and this provision in particular.

For example, petitioners assert that measures should be preempted only if they will "have a significant impact on the overall federal regulation of the average fuel economy of automobile manufacturers," and argue that is not so here where no more than about 3,000 purchase decisions would be affected. Pet. 14-15. But this is surely wrong. Indeed, it was precisely the danger of uncoordinated 3000-car-at-a-time local fuel efficiency policies that impelled

Congress to enact an explicit (and broad) preemption provision in EPCA – not a savings clause.[4] Such measures, considered individually, may be consistent with the statute's substantive, energy independence objectives, yet still violate the purposes of the preemption clause. As the Court explained in *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, "if one State or political subdivision may enact such rules, then so may any other; and the end result would undo Congress's carefully calibrated regulatory scheme." 541 U.S. 246, 255 (2004).[5]

Petitioners and amici also accuse the court of ignoring the word "standards" in the EPCA preemption

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[4] Chicago also wrongly posits that preemption is warranted only where local measures "improperly burden interstate commerce or overly intrude on federal concerns." *See* Chicago Br. 10. But these are the limitations that apply *absent* any indication of preemptive intent – indeed in cases involving statutes with *non*-preemption provisions. *See Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 869-73 (2000).

[5] Indeed, the presentation of the statute's substantive purposes is tellingly incomplete. The statute's chosen means of promoting fuel economy, corporate average standards, reflects the high value Congress put on preserving "wide consumer choice." *Ctr. for Auto Safety v. Thomas*, 847 F.2d 843, 864 (D.C. Cir. 1988), vacated on other grounds, 856 F.2d 1557 (D.C. Cir. 1988); *accord* H.R. Rep. No. 94-340, at 87 (1975). That strong policy is impinged by the Replacement Rules here, which would harshly penalize respondents and other owners for choosing a relatively fuel-efficient vehicle specifically developed for the urban taxi market, rather than a hybrid on the other side of the 25 mpg cut-off. *See infra* n.3.

provision, noting that the term "*average* fuel economy standards" is a defined term in the statute and that a regulation of purchasers would not qualify. Chicago Br. 16. But the statute refers in the disjunctive to "or fuel economy standards," and the latter, which must be presumed to have a different meaning, is not defined in the statute. Moreover, the text does not confine itself to locally-enacted "standards," but rather prohibits laws "related to" standards. In any event, this argument was soundly rejected in *Engine Manufacturers*, which held that local regulations mandating the purchase of alternative-fuel vehicles violated the CAA's preemption provision. 541 U.S. at 255. The Court explained that it "would make no sense" to treat "sales restrictions and purchase restrictions differently for pre-emption purposes." *Id.*[6]

Petitioners' efforts (Pet. 13-14) to enlist statements in this Court's opinions recognizing outer limits of "related to" miss the point. To accept that "related to" does not authorize "infinite" displacement of local law is not to erase the dominant theme of decades of ERISA jurisprudence: that the phrase *is* unusually broad and "expansive." *See FMC Corp. v.*

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[6] The City's amicus further obscures matters when it implies that *Engine Manufacturers* held that the term "'standard'" must encompass "'command, accompanied by sanctions.'" Public Citizen Br. 7 (quoting 541 U.S. at 255). As the opinion makes clear, the quoted language established that "commands" are statutorily *sufficient*. The Court expressly left open the question whether the CAA preemption language "refers only to standards that are enforceable." *Id.* at 258.

Holliday, 498 U.S. 52, 58 (1990) (describing phrase as "conspicuous for its breadth"); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) ("deliberately expansive"); *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2203 (2009) (describing phrase as "expansive"). It entails no "uncritical[] literal[ism]" or undue "stretch[ing]" (Pet. 14) to conclude that preemption is warranted where, as here, the measure at issue is meaningfully indistinguishable from one the locality itself admits is properly preempted. It could hardly be otherwise.

The weakness of petitioners' position is further revealed by their heavy reliance on statutes enacted *after* the EPCA was passed as evidence for the intent of the Congress that passed EPCA. Pet. 15-16, 21-23. While courts occasionally consider subsequent legislation when ascertaining congressional intent, *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), this Court has repeatedly recognized that "the views of a subsequent Congress," generally "form a hazardous basis for inferring the intent of an earlier one," *Bilski v. Kappos*, 130 S. Ct. 3218, 3250 (2010) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)); *accord Massachusetts v. E.P.A.*, 549 U.S. 497, 529 (2007). In any event, some of the after-enacted statutes relied upon by petitioners involve federal-incentives or federally-approved state plans, such that preemption analysis may not be implicated. *See Green Mountain Chrysler Plymouth Dodge Jeep v. Ceombie*, 508 F. Supp. 2d 295, 398 (D. Vt. 2007) (holding that

because the emission standards were passed pursuant to a federal waiver under the CAA, they were federal, not local standards, and preemption therefore does not apply); 42 U.S.C. § 13235(a) (federally-approved state plans under the Energy Policy Act); 42 U.S.C. §§ 7410(a), 7586 (federally-approved state plans under the CAA); *supra* n.8. Others involve incentives different in kind from those at issue here.

Finally, petitioners' efforts to flog the "presumption against preemption," do not amount to anything. At the outset, it is not evident from the opinion that the Second Circuit panel did not "consider" – as opposed to did not discuss – the presumption. Notably, the opinion petitioners quote (Pet. 11) for the proposition that the presumption must be explored in every preemption case was a one-Justice *dissent* in *Engine Manufacturers*, 541 U.S. at 260-61 (Souter, J., dissenting). The majority opinion there specifically acknowledged but rejected that criticism, and pointedly found preemption without discussing the presumption. *Engine Mfrs.*, 541 U.S. at 256.

Moreover, the Court repeatedly has held that there are cases – involving subject matters of longstanding federal involvement or concern – where the presumption "is not triggered." *See United States v. Locke*, 529 U.S. 89, 108 (2000). There are strong reasons for concluding that this case falls into that category. The regulation of vehicle fuel-economy and emissions are areas of longstanding federal concern, and "Congress's undoubted intent was to make the setting of fuel economy standards exclusively a

federal concern." *Green Mountain*, 508 F. Supp. 2d at 354; *accord Engine Mfrs. Ass'n v. U.S. EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996) (In "contrast to federally encouraged state control over stationary sources, regulation of motor vehicle emissions had been a principally federal project."). And while the regulation of taxicab *service* is surely an area of traditional local concern, the fuel efficiency concerns that animated this regulation are not "unique local problems" (Chicago Br. 10), but are of national character.[7] But whether or to what extent the presumption is operative is ultimately academic: the district court decision

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[7] The decision here no more brought "the taxicab industry under federal regulatory control" (Pet. 12) than did this Court's decision in *Engine Manufacturers*, 541 U.S. at 258; or the district court's injunction in *MTBOT I*, which petitioners now concede was correct; or this Court's decision in *Golden State Transit Corp. v. City of L.A.*, 475 U.S. 608, 618-20 (1986) (holding taxi licensing decision preempted under the National Labor Relations Act). Indeed, the brief submitted by the federal government below admitted that "some incentive programs, even those arising in the context of traditional state regulation of the taxicab industry, could be so onerous that they effectively would command the purchase of new vehicles" and be preempted. DOJ C.A. Br. 19 n.5.

It would be particularly odd to infer an exception for taxis when the EPCA expressly provides one for vehicles purchased for a City's "own use." *See MTBOT I*, 2008 WL 4866021, at *10-*12 (finding this exemption does not apply); *Gade v. Nat'l Solid Wastes Mgm't Ass'n*, 505 U.S. 88, 100 (1992) (O'Connor, J., plurality opinion) (where Congress includes a savings clause, "the natural implication . . . is that state laws regulating the same issue as federal laws are not saved" if they fall outside the clause's express terms).

explicitly referenced the presumption, and nonetheless found preemption. App. 34a. As in *Engine Manufacturers*, the presumption "demonstrably makes no difference to resolution of the . . . question." 541 U.S. at 256.

In sum, the court of appeals' decision finding preemption is correct.

II. THIS IS NOT A REMOTELY APPROPRIATE CASE TO SETTLE GENERAL RULES CONCERNING EPCA PREEMPTION

Even if the (interlocutory) decision below were not the first appellate case to consider the provision at issue, this case would be a singularly inappropriate vehicle for resolving the issues petitioners and amici ask the Court to decide.

First and foremost, the question whose importance and urgency they insist upon – the application of EPCA's preemption clause to local measures that provide incentives for certain vehicle types – is not actually presented here. As has been explained above, the Second Circuit was not called upon to decide – and did not decide – whether every voluntary incentive is subject to preemption. The opinion accompanying the judgment it affirmed expressly stated that the case was *not about* incentives. App. 5a, 20a. And both courts explicitly acknowledged that the judgment left in place other TLC hybrid-promoting regulations, such as the $3 incentive. *Id.*

Although the court of appeals saw no need to reach the question, the district court had found (based on a developed evidentiary record) that the Replacement Rules were not incentives but instead a de facto mandate that would "force Fleet Owners to purchase hybrid taxicabs." *Id.* 65a.

Moreover, as explained above, the opinion did not hold that "hybrid" is always a proxy for "greater fuel efficiency" – let alone that every "police power" regulation that incidentally affects vehicle choice is subject to EPCA preemption. The absence of a specific mpg standard in the Replacement Rules was held to be only a matter of "creative drafting" (*id.* 58a), and the claim that petitioners were regulating drivers' incomes was found to be pretextual (*id.* 28a n.9).

This distinctive history and procedural posture make clear that this case is unsuited for plenary review. Not only does the petition ask the Court to decide a question that was not considered by the courts below (and has not been considered by any appellate court), but any attempt to address these broader questions – let alone "bring clarity" – would necessarily be complicated by this case's many idiosyncratic features.

Even if the Court were to credit petitioners' doubtful, maximal reading of the opinion below – or the "implications" of its reasoning (Public Citizen Br. 9) – respondents would be entitled to seek affirmance of the case on alternative grounds. Indeed, the district court ruled *in respondents' favor* on two

independently sufficient grounds, based on specific findings developed after an evidentiary hearing: EPCA preemption under the "connected to" prong and preemption under the CAA.

The submissions of petitioners and amici read as if the appellate court overturned the "effective mandate" conclusion and held the Replacement Rules were in fact a mere incentive. But that is not so: those findings are undisturbed (and correct). And though petitioners refrain from asking the Court to review them (lest the full difficulty of their position be appreciated), the tactical decision to proceed piecemeal does not bind the Court. It is a testament to how poorly suited this case is for plenary review that the only relief petitioners claim this Court *could* award would be a *remand* for the Second Circuit to review, under a highly deferential standard, the district court's amply supported "effective mandate" determination. *See* Pet. 19 (claiming error only based on Second Circuit's "failure" to rule on that issue).

Petitioners would also be unlikely to successfully overturn the holding that the Replacement Rules are prohibited under the CAA. Under that statute, "exclusive control over 'standard[s] relating to the control of emissions from new motor vehicles' is vested in the federal government, and the states are preempted from regulating in the area." *Am. Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196, 198 (2d Cir. 1998) (quoting 42 U.S.C. § 7543(a)). In *Engine Manufacturers*, this Court held that a law requiring "fleets of street sweepers . . . [and] taxicabs picking up airline

passengers" to purchase or lease "green" vehicles, including alternative-fuel vehicles, was preempted by the CAA. 541 U.S. at 249. Contrary to amici's claims, the Court in that case did not reach the question of whether an incentive is preempted under the CAA.[8] Precisely because, as petitioners argue, determining whether an incentive is preempted may require an analysis of the "structure, purpose, and history of the statute" (Pet. 10), an incentive may be preempted under the CAA but not the EPCA, or vice versa.

Deciding this case would also require the Court to decide the significance of "circumvention" and post-injunction reenactment, as well as the significance of petitioners' concession that their Rescinded Rules were preempted. No other case raising preemption issues is likely to involve a defendant subject to this

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[8] When holding that a mandate to purchase alternative-fuel vehicles was preempted, the Court in *Engine Manufacturers* looked to § 246 of the CAA, which permits states to adopt purchasing mandates and financial incentives, such as increased vehicle registration fees, if they do so as part of a State Implementation Plan ("SIP"). 42 U.S.C. §§ 7581-7590. The Court noted that the CAA prescribes "numerous detailed requirements" that must be complied with to avoid preemption and saw that as further evidence that the CAA was intended to otherwise preempt emissions standards directed to purchasers. *Engine Mfrs.*, 541 U.S. at 254 n.6. This Court then asked, "what is the use of imposing such a limitation if the States are entirely free to impose their own fleet purchasing standards with entirely different specifications?" *Id.* at 258.

significant, binding (and voluntarily-assumed) constraint.[9]

Given the multiplicity of different and difficult case-specific issues raised, the prospect that the Court could or would reach the larger questions here is minute. The unique history of this case, as well as the multiple alternative grounds to strike down the Replacement Rules, make this case a particularly bad vehicle for deciding whether true incentives may be preempted.

III. THERE IS NO URGENT NEED FOR THIS COURT'S "IMMEDIATE INTERVENTION"

While acknowledging the absence of conflicting (or any) appellate authority concerning EPCA's preemption provision, petitioners and amici highlight the ubiquity, variety, and social importance of State and local hybrid incentive programs, which they claim the decision below "could" put "at risk." *See* Pet. 24; Chicago Br. 5; Public Citizen Br. 3, 9. They assert that this Court's "immediate intervention is required" "to prevent . . . state and local governments" and lower courts from reaching erroneous legal conclusions. Pet. 20.

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[9] Nor do the obstacles mentioned exhaust the barriers that petitioners would need to surmount in order to enforce the currently enjoined Replacement Rules. As noted above (*supra* n.2), the New York Court of Appeals recently granted leave to appeal on the question whether petitioners violated state law by failing to consider costs when reducing lease caps.

Doing so would be a sharp break from this Court's settled approach not to seek out opportunities to shape "new area[s] of developing law" (*see id.* 29.), but rather to withhold consideration until questions have received sustained attention from the federal appellate courts, *see* Sup. Ct. R. 10(a); E. Gressman, *Supreme Court Practice* 246 (9th ed. 2009). The reasons petitioners and amici give for abandoning that practice do not withstand casual scrutiny.

There is a logical contradiction between petitioners' claims that the decision here will lead courts and officials outside the Second Circuit astray (Pet. 20, 29) and petitioners' argument (*id.* 8-9) that the decision conflicts with this Court's and other circuits' existing precedents. If a measure is considered within the Fourth, Sixth, or Ninth Circuit courts, those courts can presumably be counted upon, without further instruction from this Court, to apply the "framework of analysis" petitioners assert their precedent correctly requires. *But see supra* I.A. (explaining that Second Circuit's framework is no different). And to the extent that "established precedents of this Court" (Pet. 8), supply the correct answer, federal courts in Chicago or St. Louis will likewise reach the appropriate conclusion. *Cf. United States v. Williams*, 184 F.3d 666, 671 (7th Cir. 1999) ("While we carefully and respectfully consider the opinions of our sister circuits, we are not bound by them.").

As for localities, it is not this Court's office to provide advance guidance to other branches of government. *See Aetna Life Ins. Co. of Hartford, Conn. v.*

Haworth, 300 U.S. 227, 240-41 (1937). Petitioners' dire forecasts depend to a great degree on fundamentally erroneous assumptions, already discussed, about (1) what was decided (and left undecided) below and (2) the likelihood that this Court's review would or even could result in broad, generally applicable guidance.

Of course, the premise that a ruling in any single case would or could settle the legality of the vast array of programs listed in the petition is itself surely mistaken. On one hand, petitioners' alarms ignore the reality that local regulations otherwise "at risk" of preemption may be permissible if they: (1) fall within EPCA's exception allowing localities to adopt fuel-economy requirements for "automobiles obtained for [their] own use," 49 U.S.C. § 32919(c); (2) were passed pursuant to another federal law or as part of a federal government approved plan (*supra* n.8); (3) were expressly saved from preemption as a regulation of the "operation, or movement of registered or licensed motor vehicles," 42 U.S.C. § 7543(d); or (4) fall under the "market participant" doctrine, *see Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (holding the state was acting as a market participant when it paid bounties to hulk haulers and scrap processors). On the other hand, this Court's decision in *Engine Manufacturers* indicates that, EPCA preemption aside, even incentives relating to the purchase of new vehicles may be challenged under the CAA, a statute that is at issue in this case – but which petitioners, despite an injunction on this ground, conspicuously do not ask the Court to "clarify." *See supra* n.8. And to the extent that voluntary

incentive measures are to be accorded distinctive treatment, courts will be called upon to develop standards for what qualifies.

Direct evidence casts doubt on the claimed immediate danger posed by the opinion here or what petitioners take to be its "implications." To date, relatively few incentives have been challenged, and none has been held preempted by a district court. The lower courts' decisions show them to have had no great difficulty (far less then petitioners and amici) giving the opinion below a less-than-maximal reading. In *Association of Taxicab Operators, USA v. City of Dallas*, No. – – F. Supp. 2d – –, No. 3:10-CV-769-K, 2010 WL 5584449 (N.D. Tex. Aug. 30, 2010), the court rejected a claim that EPCA (and the CAA) preempted a municipal rule giving compressed natural gas taxis front-of-the-line privileges at the airport, explaining that "[a]n incentive like the one in this case was never challenged in *Metro Taxicab*." *Id.* at *7. The court there emphasized that the Second Circuit's decision affirmed "the district court's statement [that] th[is] case is not about" incentives. *Id.* at *5-*7. Likewise the court in *Green Alliance Taxicab Assoc. v. King County*, No. C08-1048RAJ, 2010 WL 2643369 (W.D. Wash. June 29, 2010), held that a new-licensing regime was not preempted, on the ground it was a "voluntary incentive program," and therefore unlike the "mandate" in this case. *Id.* at *5. Indeed, the only decision, other than this one, to hold a taxi regulation – indeed *any* local regulation – preempted under the EPCA, *Ophir v. City of Boston*, 647 F. Supp. 2d 86 (D. Mass. 2009), involved an explicit mandate, which

petitioners concede is preempted. (As petitioners note, Boston later substituted an incentive, leading owners to discontinue their challenge. *See* Pet. n.14).

The reasons for restrained exercise of certiorari – gaining the benefit of other courts' sifting and testing of competing legal rules through application to concrete factual situations – are implicated here. If petitioners' alarmist predictions have even a kernel of truth, the Court will have no shortage of opportunities to consider and decide issues in which they were actually and cleanly presented and clearly decided, without the awkward posture complicating features present in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD D. EMERY
Counsel of Record
EMERY CELLI BRINCKERHOFF
& ABADY LLP
ELIZABETH S. SAYLOR
75 Rockefeller Plaza, 20th Floor
New York, New York 10019
(212) 763-5000

Counsel for Respondents

January 24, 2011

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No. 10-618 (5)

Supreme Court, U.S.
FILED
FEB 8 - 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CITY OF NEW YORK, et al.,

Petitioners,

v.

METROPOLITAN TAXICAB
BOARD OF TRADE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

Of Counsel

FRANCIS F. CAPUTO
SUSAN PAULSON
ADAM STOLOROW

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
LEONARD J. KOERNER*
100 Church Street
New York, New York 10007
(212) 788-1010 or 1362
lkoerner@law.nyc.gov

* *Counsel of Record*

Counsel for Petitioners

February 8, 2011

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CP

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

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REPLY ARGUMENT

Introduction

Respondents ignore Petitioners' central point: this Court should grant *certiorari* to confirm that when Congress enacted the Energy Policy and Conservation Act ("EPCA") as the only statutory mechanism for establishing fuel economy standards, it did not intend to preempt state and local governments from adopting incentive programs to promote the purchase of fuel-efficient vehicles.

Instead of responding to Petitioners' arguments for granting *certiorari*, and instead of addressing the decision of the Court of Appeals, Respondents oppose the grant of *certiorari* essentially by defending the decision of the District Court. The crux of Respondents' argument in opposition to Petitioners' request for *certiorari* is that because the District Court determined that the challenged regulations[1] are a *de facto* mandate to purchase hybrid vehicles, and because Petitioners did not appeal from an earlier District Court decision determining that prior regulations mandating the purchase of vehicles achieving specified mile-per-gallon standards[2] are preempted by EPCA (electing instead to re-draft their rules in an effort to address the concerns of the court), the Court of Appeals properly affirmed the District Court's determination that the challenged regulations are likely preempted by EPCA as well.

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1. 35 Rules of the City of New York ("RCNY") § 1-78(a)(3) ("Lease Cap Rules").

2. *See* 35 RCNY § 3.03(c)(10)-(11) (repealed 2009) ("25/30 MPG Rules").

The Court of Appeals decided the case, however, under an entirely different framework of analysis than that employed by the District Court. In the District Court, both the parties and the Court assumed that the Lease Cap Rules do not directly reference fuel economy standards or incorporate those standards into the Lease Cap Rules' operation. *See Metro. Taxicab Bd. of Trade v. City of New York*, 633 F. Supp. 2d 83 (S.D.N.Y. 2009) (*MTBOT II*). Accordingly, the District Court addressed whether the Rules effectively mandate the use of fuel-efficient vehicles through their economic impact, and concluded that they do. *Id.* Petitioners contested, not conceded, this conclusion of the District Court.[3]

On appeal, Petitioners argued that the Lease Cap Rules do not constitute a preempted mandate and Respondents argued that they do. The Court of Appeals rejected the District Court's framework of analysis outright, finding that "[t]his attention to economic impact was misguided." App. 12a. Thus, the Court of Appeals affirmed the injunction on grounds not argued or decided below, i.e., "because the rules in question directly regulate the relevant preempted subject matter." App. 12a. Because Respondents' arguments fail to endorse the reasoning in the decision of the Court of Appeals, their arguments contribute nothing to this Court's consideration of whether to grant *certiorari* review.

This Court should grant *certiorari* to reverse the Court of Appeals' judgment, which rests upon an erroneous

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3. The suggestion that Petitioners have "conceded" that the Lease Cap Rules constitute a preempted mandate and that the Court of Appeals left this finding "undisturbed" are blatant misrepresentations of the procedural and factual background of this case. *See* Brief in Opposition, at 3, 32.

application of this Court's preemption jurisprudence, conflicts with the analysis of "related to" preemption language applied by other Courts of Appeals, and results in the improper displacement of state law.

A. This Court Is Being Asked to Review the Decision of the Court of Appeals, Not the Decision of the District Court.

Respondents' attempt to shift the focus from the decision of the Court of Appeals to the District Court decision that it superseded is understandable, as the Court of Appeals' decision cannot be squared with this Court's precedents governing the scope of the preemptive language at issue. By reading the "related to" language in EPCA's preemption clause over-broadly, the Court of Appeals ignored this Court's instructions and arrived at an erroneous result. *See* Petition for a Writ of *Certiorari* ("Pet.") at 13-14.

EPCA does not preempt every law that relates to fuel economy; it preempts laws that are related to "fuel economy standards or average fuel economy standards." 49 U.S.C. § 32919(a). *See* Pet. at 12-13. The Lease Cap Rules do not directly regulate fuel economy standards, but rather, taxicab lease rates, a field traditionally occupied by local government.[4] Nor do the Rules contain

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4. Because, as Respondents concede, the regulation of taxicab services is a traditionally local matter, the Court of Appeals' analysis of the scope of EPCA preemption should have begun with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *See Altria Group, Inc. v. Good*, 555 U.S. 70, 129 S. Ct. 538, 543 (2008) ("When addressing questions of express or implied pre-emption, we begin our analysis with the

an impermissible reference to fuel economy standards, as the existence of federal fuel economy standards is not essential to their operation. *See Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997). The Court of Appeals reached its contrary conclusion by reading the word "standard" out of EPCA's preemption clause. *See* Brief of City of Chicago, et al., as *Amici Curiae* in Support of Petitioners ("Chicago Brief") at pp. 13-17 (Court of Appeals both misidentified the preempted subject matter and mischaracterized the Lease Cap Rules). Because, under the reasoning of the Court of Appeals, any regulation of taxicab size, shape, weight, engine technology, or equipment will inevitably have some impact on fleet fuel economy, *see* Brief for the United States as *Amicus Curiae* at 12, *MTBOT II* (No. 09-2901) ("U.S. *Amicus* Brief"), any taxicab regulation affecting a taxicab owner's choice of vehicles would be preempted by EPCA.

Rather than defending the analysis that led the Court of Appeals to its overly broad application of "related to," Respondents contend that the Lease Cap Rules are preempted on the alternative theory that they are "identical in purpose and effect" to the City's preempted MPG regulations and thus, the Court of Appeals did not have to conduct a fresh analysis of the Lease Cap Rules in

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assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."); Pet. at 11-13; Brief for the United States as *Amicus Curiae* at 11, *MTBOT II* (No. 09-2901) ("Neither before or since the enactment of EPCA has Congress sought to bring the taxicab industry under federal regulatory control").

order to find preemption.[5] *See* Brief in Opposition ("Opp.") at 21. This argument suffers from two fatal flaws. First, the Court of Appeals did not rely on an examination of either the purpose or effect of the Rules, let alone find that the two sets of rules were "identical." Respondents thus defend the District Court's decision while misstating the grounds for the Court of Appeals' decision. Second, the obvious differences between the two sets of rules demonstrate the fallacy of this point. The 25/30 MPG Rules had the purpose of requiring that 100 percent of new taxicabs across the industry (with the exception of handicap-accessible taxis) meet a mandatory performance standard. The Lease Cap Rules, by contrast, only apply to fleet owners, who comprise roughly 30 percent of the industry.[6] The explicit intent of the Lease Cap Rules, as recognized by the Court of Appeals, is to effectively shift fuel costs from fleet drivers to fleet owners, exposing

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5. Citing to a 1939 voting rights case, Respondents also argue that the Lease Cap Rules are invalid as a "circumvention" of the federal court's invalidation of the 25/30 MPG Rules. Opp. at 4, 21 (citing *Lane v. Wilson*, 307 U.S. 268 (1939)). Respondents' argument urges the absurd result that government agencies be foreclosed from pursuing legitimate objectives whenever earlier regulations of the subject matter have been found invalid. Yet, this Court has recognized that even a regulation that acts upon a preempted subject matter may be permissible. *See Dillingham*, 519 U.S. at 334; *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 658-59 (1995) (recognizing distinction between state laws that act as incentives and those that are actual or *de facto* mandates).

6. Thus, even if the Lease Cap Rules were found to create a *de facto* mandate, they are not likely to have a significant impact on the overall federal regulation of the average fuel economy of automobile manufacturers. *See* U.S. *Amicus* Brief at 14.

fleet owners (the vehicle purchasers) to roughly the same economic pressures (cost of fuel per shift) faced by owners who drive their own taxis. App. 2a, 5a. Thus the purpose of the Lease Cap Rules is to incentivize fleet owners' purchase of hybrid vehicles at rates consistent with the rest of the industry. *See* Joint Appendix ("JA") 502-503.[7]

Ultimately, because the Lease Cap Rules contain no reference to or essential incorporation of fuel economy standards, the Court of Appeals was required to examine whether the Rules mandate, or effectively mandate, something within the area that Congress intended to control. This is the approach that this Court took in *Dillingham*, 519 U.S. at 334, and *Travelers*, 514 U.S. at 658-59, both of which recognize the distinction between state laws that act as incentives and those that are actual or *de facto* mandates. Other Courts of Appeals have applied this approach in other preemption cases. *See Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007); *Associated Builders & Contractors v. Mich. Dep't of Labor & Econ. Growth*, 543 F.3d 275 (6th Cir. 2008); *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 546 F.3d 639 (9th Cir. 2008). Thus, unlike the "reference to" prong, where the magnitude of the statute's effect is not an issue, under the "connection with" prong, the court must measure the challenged law's supposed effect upon the preempted subject matter to determine whether the effect is sufficiently disruptive to merit preemption. *See Travelers*, 514 U.S. at 659-60.

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7. In 2009, hybrid and clean diesel vehicles accounted for roughly 40 percent of new taxicab purchases by owner-drivers while accounting for only 28 percent of purchases by fleet owners. JA509.

Here, the Court of Appeals erroneously departed from the analysis of its sister circuits in failing to examine whether the Lease Cap Rules' indirect effect on fuel economy constitutes a preempted mandate. *See* Pet. at 18-19. Congress's intent was not to foreclose every state action with an effect on fuel economy, but rather to maintain exclusive federal control over the regulation of manufacturers' mandatory fuel economy standards. *See* 49 U.S.C. §§ 32901(a)(6), 32919(a). Where the Lease Cap Rules do not control or supersede EPCA's central function of regulating the corporate average fuel economy standards applicable to manufacturers of automobiles, they do not have the connection to fuel economy standards forbidden by EPCA.

B. This Case Presents an Urgent Question of National Importance Requiring Immediate Review.

While Respondents attempt to reassure this Court that the Court of Appeals' ruling is narrow and will not place other incentive programs at risk, they fail to address the fact that the overly broad language of the ruling below has already had a chilling effect on other local governments' efforts to promote fuel-efficient taxicabs. As noted by municipal *amici*, both Minneapolis and Seattle have already curtailed their experimentation with fuel-efficient taxicab regulations in direct response to the ruling in this case. Chicago Brief at pp. 28-29. Thirteen additional cities, the United States Conference of Mayors, the National League of Cities, and the International Municipal Lawyers Association all joined with Chicago to argue that the Court of Appeals' ruling will impede their efforts to implement forward-thinking incentive programs.

Moreover, Respondents' argument that this Court should not concern itself with the Court of Appeals' error, because future courts will distinguish Petitioners' case on the facts, is purely speculative. Of the decisions cited by Respondents, only *Association of Taxicab Owners, USA v. City of Dallas* was issued recently enough to cite the Court of Appeals' ruling, and that case did not involve EPCA. *See Ass'n of Taxicab Operators, USA v. City of Dallas*, No. 3:10-CV-769-K, 2010 U.S. Dist. LEXIS 140240 (N. Dist. Tex. Aug. 30, 2010) (front-of-the-line privileges awarded to compressed natural gas taxicabs at Dallas Love Field airport challenged as preempted by the Clean Air Act).[8] The Court of Appeals' ruling informs other courts that they need no longer concern themselves with finding the line between true incentives and *de facto* mandates.[9] Respondents' assurances that courts in other circuits will apply their own definition of "related to" misses the critical point that, in cases challenging hybrid vehicle incentives, these courts will look to the Second Circuit's EPCA-specific interpretation of "related to"

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8. The Boston and Seattle cases cited by Respondents were decided before the Court of Appeals' ruling, and thus cited the decision of the District Court, not of the Court of Appeals, for the distinction between an incentive and a *de facto* mandate. *See Ophir v. City of Boston*, 647 F. Supp. 2d 86 (D. Mass. 2009), *Green Alliance Taxi Cab Ass'n v. King County*, No. C08-1048RAJ, 2010 U.S. Dist. LEXIS 72409 (W.D. Wash. June 29, 2010).

9. Respondents posit four categories of incentives that would be safe from preemption challenges, but fail to apply these categories to any of the numerous state and local incentives cited in the Petition. Opp. at 36. None of the cited incentives fall within category (1) (own use) or (4) (market participant). Categories (2) and (3) are Clean Air Act provisions of limited applicability to the EPCA-based preemption challenges addressed here.

before considering what that phrase has meant in ERISA cases. The Court of Appeals' ruling both diverges from existing preemption jurisprudence and sets a uniquely bad precedent for future EPCA cases.

The Court of Appeals' ruling is already working its mischief, and this Court should act swiftly to correct it. Each incentive program that is stifled before it can be implemented will decrease the likelihood that other courts will be presented with this issue at all. The interlocutory nature of this appeal should not prevent the Court from taking this opportunity to address the proper scope of preemption under EPCA. The factual record in this case is well developed, and the Court of Appeals' decision, resting solely on the basis that Respondents had "demonstrated a likelihood, indeed a certainty, of success on the merits" of their preemption claim, presents this Court with a clean and clearly decided issue worthy of review. App. 12a.

This Court should not heed Respondents' attempts to distort or obscure the question presented. Respondents' decision not to challenge the $3 upward adjustment of the lease cap at the preliminary injunction stage (they do challenge it on the merits), does not mean that this case is not about incentives. *See* Opp. at 30; *see also* App. 5a (Court of Appeals noting that "[f]or obvious reasons, the [Respondents] did not challenge the $3 upward adjustment of the lease caps for hybrid taxis, which benefitted them"). To the contrary, this case squarely presents the question whether the City's clean-vehicle incentive program creates a preempted mandate. Both the $3 upward adjustment and $12 downward adjustment provide financial incentives for fleet owners to change their economic behavior. Neither the Court of Appeals nor the District Court drew any

legal distinction between the upward and downward adjustments.[10] The Court of Appeals' determination that the incentive/mandate analysis is irrelevant does not mean that its decision excludes incentives. On the contrary, it is dangerously overbroad precisely because it erases this critical distinction and sweeps both incentives and mandates within its reach.

Finally, Respondents are wrong in repeatedly asserting that the Petition presents a hypothetical case to this Court. *See* Opp. at 3, 15, 20, 24, 32. The Lease Cap Rules have been invalidated by the Court of Appeals on a preemption theory that does not square with precedents of this Court, or with how other Courts of Appeals have understood those precedents. The Court should reverse and remand, and the Court of Appeals should be required to decide this case in accord with this Court's precedents. Whether Petitioners will ultimately prevail under the proper application of preemption law is irrelevant to this Court's determination whether to grant this writ. This case raises an issue of considerable and immediate importance, because few if any incentive programs designed to encourage fuel-efficient vehicle use will be able to escape the breadth of the Court of Appeals' interpretation of preemption under EPCA.

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10. Indeed, the entire purpose of the District Court's evidentiary hearing, properly required under *Travelers*, was to determine whether the downward adjustment was permissible as an incentive or preempted as a *de facto* mandate. App. 34a-35a.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
LEONARD J. KOERNER*
100 Church Street
New York, New York 10007
(212) 788-1010 or 1362
lkoerner@law.nyc.gov

* *Counsel of Record*

Counsel for Petitioners

Of Counsel

FRANCIS F. CAPUTO
SUSAN PAULSON
ADAM STOLOROW

February 8, 2011

No. 10-618

Supreme Ct., U.S.
FILED
DEC 9 - 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CITY OF NEW YORK, *et al.*,
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v.

METROPOLITAN TAXICAB BOARD OF TRADE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CITY OF CHICAGO, *et al.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
BENNA RUTH SOLOMON*
Deputy Corporation Counsel
DIANE M. PEZANOSKI
Deputy Corporation Counsel
MYRIAM ZRECZNY KASPER
Chief Assistant Corporation Counsel
GRAHAM G. MCCAHAN
Assistant Corporation Counsel
30 N. LaSalle St., Suite 800
Chicago, IL 60602
(312) 744-7764
benna.solomon@cityofchicago.org

*Counsel of Record

Additional counsel listed inside the cover

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

SUE B. CAIN
Director of Law
JAMES L. CHARLES
Associate Director of Law
The Metropolitan
Government of Nashville
& Davidson County
Tennessee
Room 108, Metropolitan
Courthouse
P.O. Box 196300
Nashville, TN 37219
(615) 862-6341

LARS ETZKORN
Program Director
Center for Federal Relations
National League of Cities
1301 Pennsylvania Ave.,
N.W.
Washington, DC 20004
(202) 626-3000

DAVID M. FELDMAN
City Attorney
CEIL PRICE
Senior Assistant City
Attorney
P.O. Box 368
Houston, TX 77001
(832) 393-6291

DAVID R. FINE
City Attorney
JACQUELINE H. BERARDINI
Assistant City Attorney
City & County of Denver
1437 Bannock Street
Room 353
Denver, CO 80202
(720) 913-3287

PETER S. HOLMES
City Attorney
KENT C. MEYER
Assistant City Attorney
600 Fourth Avenue
4th Floor
P.O. Box 94769
Seattle, WA 98124-4679
(206) 684-8200

DEVALA JANARDAN
Associate Counsel/Director
of Legal Advocacy
International Municipal
Lawyers Association
7910 Woodmont Avenue
Suite 1440
Bethesda, MD 20814
(202) 466-5424

KAREN KENNARD
Acting City Attorney
ROBIN SANDERS
Assistant City Attorney
City of Austin Law Department
P.O. Box 1088
Austin, TX 78767
(512) 974-2268

LINDA MENG
City Attorney
HARRY M. AUERBACH
Chief Deputy City Attorney
BENJAMIN E. WALTERS
Chief Deputy City Attorney
Room 430, City Hall
1221 SW Fourth Avenue
Portland, OR 87204
(503) 823-4047

THOMAS P. PERKINS, JR.
City Attorney
CHRISTOPHER J. CASO
BARBARA E. ROSENBERG
Assistant City Attorneys
Dallas City Attorney's Office
1500 Marilla Street
Room 7B North
Dallas, Texas 75201
(214) 670-3519

JOHN DANIEL REAVES
General Counsel
United States Conference of Mayors
1200 New Hampshire Avenue, N.W., 8th Floor
Washington, D.C. 20036
(202) 776-2305

DANIEL D. REGAN
Solicitor
ELAINE WIZZARD
Assistant Solicitor
City of Pittsburgh
Department of Law
313 City-County Building
414 Grant Street
Pittsburgh, PA 15219
(412) 255-2015

EDWIN P. RUTAN, II
City Attorney
LAURA KIRWAN
Senior City Attorney
Salt Lake City Corporation
P.O. Box 145478
451 South State Street
Suite 505
Salt Lake City, UT 84114
(801) 535-7788

SUSAN L. SEGAL
City Attorney
JOEL M. FUSSY
Assistant City Attorney
City of Minneapolis
350 South 5th Street
City Hall Room 210
Minneapolis, MN 55415
(612) 673-2010

WILLIAM F. SINNOTT
Corporation Counsel
SUSAN M. WEISE
First Assistant
City of Boston
Law Department
City Hall, Room 615
Boston, MA 02201
(617) 635-4034

ADRIENNE SOUTHGATE
City Solicitor
City of Providence Law Department
275 Westminster Street, Suite 200
Providence, RI 02903
(401) 421-7740, x333

CARMEN A. TRUTANICH
City Attorney
WILLIAM W. CARTER
Chief Deputy City Attorney
PEDRO B. ECHEVERRIA
Chief Assistant City Attorney
200 North Main Street, Suite 800
Los Angeles, CA 90012
(213) 978-8748

QUESTION PRESENTED

Whether a local government program that creates an incentive, but contains no mandate, for taxicab owners to purchase alternative-fuel vehicles, which are defined by reference to engine technology and not fuel efficiency, is preempted under 49 U.S.C. § 32919(a), which prohibits local regulations "related to fuel economy standards."

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IN THE

Supreme Court of the United States

No. 10-618

CITY OF NEW YORK, *et al.*,
Petitioners,

v.

METROPOLITAN TAXICAB BOARD OF TRADE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CITY OF CHICAGO, *et al.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici are local governments across the country and national organizations of local government officials.*

* Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part; and no counsel or party, other than the City of Chicago, made a monetary contribution to fund the preparation or submission of the brief. Pursuant to Rule 37.2, counsel for both petitioners and respondents were notified

All of the local government signatories of this brief – Austin, Boston, Chicago, Dallas, Denver, Houston, Los Angeles, Minneapolis, Nashville, Pittsburgh, Portland, Providence, Salt Lake City, and Seattle – have adopted important environmental programs for their communities. Many of these programs aim to promote sustainability and reduce air pollution. *Amici* therefore have a compelling interest in legal issues affecting local governments and in this case in particular.

The International Municipal Lawyers Association ("IMLA") is a non-profit, professional organization of over 3500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before this Court, the federal courts of appeals, and state supreme and appellate courts.

The National League of Cities ("NLC") is the oldest

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more than 10 days before the due date of the brief or our intent to file this brief; their written consent is submitted with this brief.

and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The United States Conference of Mayors ("USCM") is the official non-partisan organization of all United States cities with populations of 30,000 or more. Members are represented in USCM by their chief elected official, the mayor. USCM's official policy provides that taxi regulators across the country should set fuel-economy and emissions standards for vehicles they regulate. The policy applies to taxicabs and other vehicles operated for hire pursuant to an operating license, permit, or other authorization issued by a state or political subdivision and providing local transportation for a fare determined primarily on the basis of time and/or distance traveled.

This case concerns a claim of preemption directed against a New York City regulation that creates incentives for owners of taxicab medallions to purchase hybrid-electric and clean-diesel taxicabs. The court of appeals relied on an express preemption provision of the Energy Policy and Conservation Act, 49 U.S.C. § 32919(a)(2010)("EPCA"), to invalidate this regulation. This decision was incorrect and should be reversed.

While EPCA's preemption is broad, it does not reach rules that encourage but do not mandate purchase of hybrid or clean-diesel vehicles. Morever, the decision puts at risk numerous other regulatory programs nationwide.

Several other local governments, including Boston, Dallas, and King County, Washington, adopted similar taxicab regulations. Many more are engaged in a variety of creative programs to encourage residents to choose more fuel-efficient vehicles. For example, Salt Lake City provides free parking at city parking meters for low-polluting and fuel-efficient vehicles. See Salt Lake City Code § 12.56.205 (2010). Portland has partnered with local utilities and automobile manufacturers on a federal grant to promote electric vehicles, installing charging infrastructure throughout the region and adopting "electric vehicle" exclusive on-street parking spaces. And Boston formed a partnership with NSTAR Electric and the International Brotherhood of Electrical Workers to encourage plug-in hybrid-electric vehicles. All of these programs, and more, are aimed at reducing our country's over-dependence on fossil fuels, which causes pollution, contributes to climate change, and threatens national security, as EPCA itself makes clear. If not reviewed, the decision below could stifle innovation we can hardly afford to forgo.

This Court has repeatedly recognized that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The court below has halted local experimentation with making taxicabs more energy-efficient. Its decision has already curtailed the enforcement and implementation of similar programs in Minneapolis and Seattle (see *infra* at 28-29) and could affect countless other innovative programs around the country. Because the decision in this case will have a direct effect on matters of substantial importance to *amici* and their members, *amici* submit this brief to assist the Court in determining whether the petition for a writ of *certiorari* should be granted.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[L]ively, diverse, intense cities contain the seeds of their own regeneration, with energy enough to carry over for problems and needs outside themselves." Jane Jacobs, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 448 (Vintage Books 1992). In 2010 and into the foreseeable future, lively, diverse, intense American cities need cars. Although cities work best when their residents, workers, and visitors have various transportation options, cities depend upon cars to move people around. And people moving around, by whatever means, give cities their energy and vitality. Unfortunately, just as modern American cities need cars, cars need energy – copious amounts of energy.

In 2009, the United States consumed 18.7 million barrels of petroleum per day. See U.S. Energy Information Administration, *Annual Energy Review 2009*, DOE/EIA-0384, Figure 5.1 (2010), *available at* http://www.eia.doe.gov/emeu/aer/pdf/aer.pdf. Motor gasoline for the transportation sector accounted for more than 8.8 million barrels, or 47%, of that daily total. See *id.* at Table 5.13c. This energy consumption comes at a cost. The United States spent nearly $199 billion on crude oil imports in 2009, and net imports accounted for almost 52% of United States petroleum consumption that same year. See *id.* at Tables 5.20, 5.7. Recognizing both the pecuniary and non-

pecuniary costs of the Nation's petroleum consumption and importation, Congress enacted EPCA in 1975 to "decrease dependence on foreign imports, enhance national security, achieve the efficient utilization of scarce resources, and guarantee the availability of domestic energy supplies at prices consumers can afford." S. Rep. No. 94-516, at 117 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1956, 1957.

In addition to these energy-related costs, highway vehicles accounted for 50% of United States emissions of carbon monoxide, 32% of nitrogen oxides, and 21% of volatile organic compounds ("VOCs") in 2007 and 2008. See U.S. EPA, National Emissions Inventory Air Pollutant Emissions Trends Data, 1970 - 2008 Average Annual Emissions, *available at* http://www.epa.gov/ttnchie1/trends/. Carbon monoxide reduces the flow of oxygen in the bloodstream and is dangerous to persons with heart disease. U.S. EPA, *Automobile Emissions: An Overview*, EPA 400-F-92-007, 2 (1994), *available at* http://www.epa.gov/oms/consumer/05-autos.pdf. Nitrogen oxides and VOCs are both precursors to the formation of ground-level ozone, which damages the lungs and aggravates respiratory problems, and is, according to the U.S. EPA, "our most widespread and intractable urban air pollution problem." *Ibid.* In addition, as much as half of all cancer caused by outdoor sources of air toxics may be attributed to motor vehicles. See U.S. EPA, *Air Toxics from Motor Vehicles*, EPA 400-F-92-004, 1-2 (1994), *available at*

http://www.epa.gov/otaq/toxics.htm. Moreover, light-duty vehicles (cars and light trucks) account for nearly 20% of United States carbon dioxide emissions. See U.S. EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2008*, EPA 430-R-10-006, 3-12 (2010), *available at* http://www.epa.gov/climatechange/emissions/usinventoryreport.html. As this Court recently found, "U.S. motor-vehicle emissions make a meaningful contribution to [global] greenhouse gas concentrations . . . ." *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007).

Congress did not intend EPCA to preempt efforts by cities to manage their transportation networks, promote energy independence, reduce air pollution, or fight climate change through clean-vehicle incentive programs. The text of EPCA, interpreted in light of this Court's preemption precedents, makes this clear. New York City's particular clean-vehicle incentive program, 35 Rules of the City of New York § 1-78(a)(3) ("Lease Cap Rules" or "Rules"), is a permissible regulation for two reasons. First, the Lease Cap Rules contain a technology-based standard that does not impermissibly relate to the federal fuel-economy standards that are the subject matter of EPCA and its preemption clause. Second, the Lease Cap Rules are an incentive program for taxicab owners and thus do not impermissibly relate to EPCA's fuel-economy program, which prescribes performance standards for manufacturers. The court of appeals improperly

expanded EPCA preemption by misinterpreting its text and failing to heed the presumption against preemption of historic local police powers. This Court has long operated under "the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). And the Court has continued to recognize that this assumption applies "with particular force when Congress has legislated in a field traditionally occupied by the States." *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (citation omitted).

Although the federal government has asserted significant authority over interstate transportation, energy, and air quality on a national level, local governments have traditionally exercised substantial authority over their transportation networks and streets. See, *e.g.*, *Buck v. California*, 343 U.S. 99, 102 (1952) (local regulation of taxicabs); *Detroit, Fort Wayne, & Belle Isle Railway v. Osborn*, 189 U.S. 383, 390 (1903) (local order requiring railway to install safety devices); *Karpark Corp. v. Town of Graham*, 99 F. Supp. 124, 128 (D.C.N.C. 1951) (local regulation of parking meters). See also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 97 (1824) (counsel's list of local licensing laws for stage carriages). This includes local regulations aimed at reducing air pollution from the transportation sector. See, *e.g.*, *Pacific Gas & Electric*

Co. v. Police Court, 251 U.S. 22, 25-26 (1919) (local regulation requiring street railroads to suppress dust is within police power and collecting cases). Consistent with these historic police powers, New York City and other local governments have adopted clean-vehicle incentive programs to increase the efficiency of their transportation networks and promote better air quality. Pet. 25-27. These local incentive programs vary in their content and scope, but such variety and innovation are laudable and should be permissible in our federal system.

Preserving a space for local experimentation benefits not only the governments that pilot original programs but also the Nation as a whole. See, *e.g.*, *Oregon v. Ice*, 129 S. Ct. 711, 719 (2009). Local governments need room to innovate within the federal framework because unique local problems often demand unique local solutions; and if a local solution is found, it is one less problem left for another level of government. Or, local governments across the country may face similar problems, and the programs of one can serve as a source of solutions for others. Either way, the rest of the country reaps the benefits of local innovation while not bearing the costs. There are instances, of course, where local innovations may improperly burden interstate commerce or overly intrude upon federal concerns, but courts are properly reluctant to invalidate on either ground local programs adopted

pursuant to their historic police powers. See *Altria Group*, 129 S. Ct. at 543.

The court below misread the statute and misapplied this Court's precedents. As the petition makes clear, it also created a conflict in the circuits. Pet. 9. From the perspective of the *amici*, the decision's sweeping breadth alone warrants granting the petition. The court of appeals' expansive interpretation of EPCA's preemption provision encourages challenges to other local incentive programs around the country that promote the use of clean, fuel-efficient motor vehicles in American cities and towns. It also chills the development and implementation of future programs by encouraging litigation against them. To address the important issue of EPCA preemption and provide clarity to the courts of appeals, to state and local governments, and to businesses and consumers weighing the short-term benefits of lower-cost, traditional vehicles against the long-term implications for our Nation of continuing our over-dependence on traditional energy sources to power those vehicles, the Court should grant the petition for a writ of *certiorari*.

REASONS FOR GRANTING THE PETITION

I. EPCA SHOULD NOT BE INTERPRETED TO PREEMPT LOCAL CLEAN-VEHICLE INCENTIVE PROGRAMS.

The court of appeals ruled that EPCA preempts even technology-based clean-vehicle incentive programs, like New York City's Lease Cap Rules. The plain language of the preemption provision shows that this is wrong for two reasons. First, the court omitted an important textual limitation on the scope of preemption, which restricts its reach to laws and regulations related to federal annual fuel-economy standards for manufacturers. Second, it ignored the difference between technology-based programs that provide incentives and those that impose mandates.

EPCA preempts local regulations "related to fuel economy standards or average fuel economy standards." 49 U.S.C. § 32919(a). The statute defines "average fuel economy standard" as "a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year," *id.* § 32901(a)(6), while "fuel economy standard" itself is not defined. Nonetheless, "it is an ancient and sound rule of construction that each word in a statute should, if possible, be given effect." *Crandon v. United States*, 494 U.S. 152, 171 (1990) (Scalia, J., concurring). In violation of this ancient and sound

rule, the court below failed to give effect to the phrase "fuel economy standard" when it interpreted EPCA's preemption clause. As a result, it reached an interpretation far broader than if it had accommodated all the statutory terms.

The court of appeals did not offer a definition of "fuel economy standards," but leapt to the erroneous conclusion that the Rules "are directly related to fuel economy standards" based on the idea that "they rely on fuel economy, and nothing else, as the criterion for determining the applicable lease cap." Pet. App. 11a. This conclusion both misidentifies the preempted subject matter and mischaracterizes the Rules. With respect to the scope of EPCA preemption, EPCA does not preempt local regulation that relies on "fuel economy," but only regulation that relates to "fuel economy standards." The court below simply read the word "standard" out of EPCA's preemption clause. In turn, because the court failed to give effect to a word of limitation, it impermissibly expanded the scope of preemption and swept in local regulation that may relate to "fuel economy" but does not relate to "fuel economy standards" as used in EPCA – namely, as we explain below, federal performance standards directed at manufacturers.

And with respect to the Lease Cap Rules, the court of appeals mischaracterized them by stating that the Rules "rely on fuel economy, and nothing else, as the

criterion" for determining lease rates. The Rules do indeed rely on something else to determine the applicable lease cap – a technology-based criterion that differentiates between hybrid and clean-diesel engines, on the one hand, and traditional gasoline engines on the other. The court incorrectly determined that "'hybrid' is simply a proxy for 'greater fuel efficiency'" and, therefore, that the Rules impermissibly relate to fuel-economy standards. Pet. App. 11a. In support of its conclusion, the court stated that "EPCA specifically requires the separate consideration of 'dual fueled' vehicles, including hybrids, in the determination of national fuel economy standards." *Id.* at 10a. This misses the point. EPCA may require federal regulators to separately consider hybrids in determining fuel-economy standards, but that does not make engine technology a "fuel economy standard." Federal regulators must also consider vehicle weight when they set separate average fuel-economy standards for passenger automobiles and larger commercial vehicles. See 49 U.S.C. § 32902(b). See also *id.* §§ 32901(a)(7), 32901(a)(18), 32901(a)(19) (defining different vehicles classes by weight for purposes of setting separate fuel-economy standards). Nonetheless, neither of these requirements makes local laws based on engine technology or that classify vehicles by weight a "fuel economy standard."[1]

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[1] Weight restrictions are commonplace. See, *e.g.*, *Hager v. City of West Peoria*, 84 F.3d 865, 867 (7th Cir. 1996) (local prohibition of

The court also found the Rules problematic because they are not "neutral to the fuel economy of the vehicles to which they apply." Pet. App. 11a. To be sure, engine technology can affect fuel economy, but a technology-based local incentive program with an effect on fuel economy does not thereby have a prohibited relationship to "fuel economy standards" under EPCA. Many design features of new automobiles affect fuel economy: size, shape, weight, energy-using accessories, and tire type. See National Research Council, *Effectiveness and Impact of Corporate Average Fuel Economy (CAFE) Standards* 31-32, 95 (2002), *available at* http://www.nhtsa.gov/cars/rules/cafe/docs/162944_web.pdf. Thus, mandating taxicabs of a certain size or capacity, for instance, undoubtedly affects a fleet's fuel economy. Under the court of appeals' reading of EPCA, any local taxi regulation or other programs that require or promote certain vehicles based on these or other design features would be preempted because such programs are not fuel-economy neutral.

Although EPCA does not define the term "fuel economy standards," the broader statutory scheme provides a guide to its scope. In order to interpret a statutory term, courts may look to the particular statutory language at issue, as well as "the language and design of the statute as a whole." *K Mart Corp. v.*

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overweight vehicles on certain streets).

Cartier, Inc., 486 U.S. 281, 291 (1988). EPCA refers to "fuel economy standards" in other parts of the statute where, as in the preemption provision itself, that term is used separate from the term "average fuel economy standards." See, *e.g.*, 49 U.S.C. §§ 32902(b)(2)(C), 32902(e)(2), 32902(h)(3), 32902(k)(2), 32902(k)(3). Both these other provisions and the other portion of the preemption clause itself can and should be consulted to determine the scope of local regulation that is preempted because it is "related to fuel economy standards."

These other uses of the same term reveal that "fuel economy standards" means the same thing as "average fuel economy standards," except with the "average" component removed. Thus, "a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year" becomes the more general "a performance standard specifying fuel economy applicable to a manufacturer in a model year."[2] Framed in this way, it becomes clear that a

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[2] See, *e.g.*, 49 U.S.C. § 32902(b)(2)(C) (Secretary of Transportation "shall prescribe annual fuel economy standard increases that increase the applicable average fuel economy standard"); *id.* § 32902(e)(2) (manufacturers may exclude emergency vehicles "in applying a fuel economy standard under subsection (a), (b), (c), or (d) of this section," concerning Secretary's decisions regarding average fuel-economy standards); *id.* § 32902(h)(3) (factors Secretary may not consider "when prescribing a fuel economy standard" pursuant to subsections (c), (f), and (g), concerning the

local technology-based regulation does not bear a prohibited relationship to the preempted subject matter – the annual fuel-economy performance standards for manufacturers – even if the regulation has an impact on fuel economy. That is because the performance standards mandate a level of compliance for manufacturers, but not any particular engine technology for achieving compliance. Engine technology is just one of many design features that manufacturers may consider in complying with their annual performance standards. Therefore, a local technology-based regulation does not relate to those performance standards such that it is preempted under EPCA.

Not only are the Lease Cap Rules permissible under EPCA because they reflect a technology-based standard and not a miles-per-gallon standard, but they also escape preemption because they are an incentive program rather than a mandate. As this Court has recognized in another preemption context, voluntary incentive programs are "significantly different from command-and-control regulation." *Engine Manufacturers Association v. South Coast Air Quality*

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setting and amendment of average fuel-economy standards); *id.* § 32902(k)(3) (subsection (b)(1)(C) directs Secretary to prescribe average fuel-economy standards for larger commercial vehicles in accordance with subsection (k), and subsection (k) refers to the "work truck fuel economy standard adopted pursuant to this subsection").

Management District, 541 U.S. 246, 258 (2004). This distinction applies with particular force when, as here, the federal statute at issue is intended to subject businesses engaged in interstate commerce to uniform national standards. See, *e.g.*, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 656-57 (1995). This is because local incentives merely act as an "indirect economic influence" on the national market and do not further regulate that market such that the uniformity of the federal scheme is disrupted. See *id.* at 659; *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 334 (1997) ("We could not hold pre-empted a state law in an area of traditional state regulation based on so tenuous a relation without doing grave violence to our presumption that Congress intended nothing of the sort."). As we explain above, EPCA preempts only local regulations related to the federal fuel-economy standards directed at manufacturers. Thus, by providing an incentive rather than imposing a manufacturing or purchase requirement, the Rules are neither related to EPCA's manufacturer-focused fuel-economy standards, nor do they disrupt its manufacturer-focused program.

II. THE COURT BELOW SHOULD HAVE APPLIED THE PRESUMPTION AGAINST PREEMPTION BECAUSE TAXICAB REGULATIONS ARE AN EXERCISE OF THE HISTORIC POLICE POWERS OF LOCAL GOVERNMENTS.

Were there any doubt about the language of EPCA's preemption clause, the court below erred by not applying the presumption against preemption. "[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group*, 129 S. Ct. at 543 (quoting *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005)). This is a mainstay of this Court's analysis when a claim of preemption is directed against the historic police powers of state and local governments. See, *e.g.*, *Rice*, 331 U.S. at 230. Given this presumption, preemption is proper only when "Congress has made such an intention clear and manifest." *E.g.*, *Bates*, 544 U.S. at 449 (citations and internal quotations omitted). In particular, this Court has cautioned that courts should not take the preemptive phrase "relate to" to the "furthest stretch of indeterminacy, [because] then for all practical purposes pre-emption would never run its course . . . . [T]hat, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the

law whenever Congress speaks to the matter with generality." *Travelers*, 514 U.S. at 655.

Local governments have traditionally regulated their streets and transportation networks in order to protect the general health, safety, and welfare of their citizens. Given this historic local regulatory power and the lack of "clear and manifest" intention on the part of Congress, the court of appeals should have rejected preemption. That result simultaneously honors the text of EPCA's preemption provision, preserves the ability of local governments to regulate their streets and transportation networks, and furthers EPCA's energy-independence and national-security goals.

Local governments manage transportation to promote mobility, efficiency, safety, and air quality. Achieving these goals can be difficult in a complex urban system with many countervailing forces and a multitude of individual and institutional actors, so cities must be creative and flexible as they attempt to align market forces with socially beneficial outcomes. Such balancing is the foundation of the police power and is nowhere more important than in our dense, complex, diverse cities. This Court long ago recognized the importance of the police power for cities:

> [O]perations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building

> with combustible materials, and the burial of the dead, may all . . . be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.

Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 62 (1872) (internal quotation marks omitted).

Local governments have regulated taxicabs pursuant to their police powers for decades. See, *e.g.*, *Buck*, 343 U.S. at 102. More generally, local regulation and licensing of public transit and conveyances for hire have an even longer history. See, *e.g.*, *Belle Isle Railway*, 189 U.S. at 390 (electric streetcars); *Fanning v. Gregoire*, 57 U.S. (16 How.) 524, 534 (1853) (ferry boats); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) at 203 ("laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., . . . remain subject to state legislation"). Local control over the transportation network has long included regulations addressing safety, air quality, and other subjects within the retained police power. See, *e.g.*, *Pacific Gas & Electric*, 251 U.S. at 25-26 (regulating street railways to suppress dust); *Belle Isle Railway*, 189 U.S. at 390 (requiring railway to install safety

devices); *New York, New Haven & Hartford Railroad Co. v. New York*, 165 U.S. 628, 629 (1897) (prohibiting railroads from heating passenger cars with internal stoves or heaters). In addition, local governments have a lengthy history of balancing competing uses of their streets and waterways to enhance the efficiency of their transportation networks and promote public convenience. See, *e.g.*, *Cincinnati, Indianapolis, & Western Railway Co. v. City of Connersville*, 218 U.S. 336, 340-41 (1910); *Escanaba & Lake Michigan Transportation Co. v. City of Chicago*, 107 U.S. 678, 681 (1883); *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, 721-22 (1865).

Local governments have adopted clean-taxicab incentive programs to promote air quality and increase the efficiency of their transportation networks. Taxicabs serve a particular purpose in urban networks. Unlike most mass transit trips, taxicabs can go directly from door-to-door (and point-to-point in a multimodal journey). And unlike most private vehicle trips, taxicab service does not require a parking space at either end of the trip, which frees up building and street space for other uses, and can reduce pressure for private car ownership and rentals. See generally Paul S. Dempsey, *Taxi Industry Regulation, Deregulation, & Reregulation: the Paradox of Market Failure*, 24 Transp. L.J. 73, 117-18 (1996). Just as government involvement in mass transit is justified under a public-good theory, public-good and market-failure theories

also support traditional regulation of the taxicab industry. See *id.* at 91-100. Air pollution is one such market failure, or negative externality, that local governments have attempted to address through clean-taxicab incentive programs. See *id.* at 94-96.

In addition, taxicab incentive programs may help reduce the disruptive effects of fluctuating fuel costs on the taxicab market. In an era of volatile fuel prices, a taxicab fleet that relies upon diversified energy sources and maximizes energy efficiency may be better able to perform the unique functions for which urban transportation networks rely on taxi service. New York City adopted its Lease Cap Rules to correct "a structural problem with the standard vehicle lease arrangement that artificially insulated fleet owners from fuel costs" because drivers who lease their vehicles bear the cost of fuel. Pet. 4. And, recognizing the impact that fluctuating fuel costs have on the taxi market, Chicago allows taxi drivers to impose an additional gasoline surcharge on all fares under certain conditions and when gasoline prices exceed a certain threshold. See Municipal Code of Chicago, Ill. § 9-112-510(e) (2010). Regulations of this sort may serve to enhance the stability and efficiency of the taxicab market as a whole by ensuring that the service providers are adequately compensated when fuel prices rise. See Dempsey, *supra*, 24 Transp. L.J. at 111-14 (finding evidence of service deterioration and

inadequate vehicle upkeep when taxicab operators are not adequately compensated).

Local governments also encourage clean-vehicle use by the general public. Local programs include tax incentives, sales rebates, parking incentives, high-occupancy vehicle ("HOV") lane exemptions, and a host of other incentives for fuel-efficient or clean vehicles. Pet. 25-27. Such programs support national energy independence and reduce greenhouse gas emissions. Moreover, clean-vehicle incentive programs help cities improve local air quality. This Court has properly recognized that as a core police power function. See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power."). Because clean-vehicle incentive programs fall within fields traditionally subject to local regulation, the court below should have applied the presumption against preemption, and determined that the Lease Cap Rules were not preempted.

III. ALLOWING LOCAL GOVERNMENTS TO ADOPT INNOVATIVE CLEAN-VEHICLE INCENTIVE PROGRAMS ADVANCES THE GOALS OF EPCA.

Because Congress has not made its intent to supplant state law clear and manifest, the settled rule is that state and local governments remain free to act "in matters requiring diversity of treatment according to the special requirements of local conditions." *Milk Control Board of Pennsylvania v. Eisenberg Farm Products,* 306 U.S. 346, 351 (1939). And "[o]ne of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens." *Ibid.* "Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively." *Gilman*, 70 U.S. (3 Wall.) at 726-27. In short, unique local conditions often require unique local solutions, and local governments are often in the best position to design and implement such solutions.

The management of local transportation networks requires just this sort of "diversity of treatment" because of local conditions. Population centers vary greatly in their geography, weather conditions, density, built environments, mass transit options, and

transportation patterns. These unique characteristics affect a city's transportation network. For instance, cruising cabs, which drive around searching for pedestrians to hail them, are successful only in larger cities with high population densities. See Dempsey, *supra*, 24 Transp. L.J. at 88. In other cities, a larger percentage of the taxi fleet is radio-dispatched or relies on cabstands at airports or hotels. See *id.* Where cabs regularly cruise, regulators may choose to promote engine technologies that allow easy refueling (like hybrid-electric vehicles that are powered primarily by gasoline or clean diesels, which both can be refueled at neighborhood gas stations). Where particular cabstands are more intensively used, on the other hand, refueling infrastructure at these locations may support more specialized engine technologies like compressed natural gas or full-electric vehicles.

Cities also differ markedly with respect to the air quality impacts of their transportation networks. Salt Lake City and Denver, for example, have temperature inversions during the winter that combine with their unique geographies to greatly increase the likelihood of smog. There also may be more tourists using taxicabs during the winter. And cold weather may prompt residents to shift from mass transit to more energy-intensive modes of travel. Local governments must account for these and other seasonal trends when attempting to reduce overall emissions from their transportation networks. Such local differences

require local solutions, and this variety can be a source of innovation that can benefit the entire country. In addition, local experimentation may help cities maintain or achieve compliance with federal air quality standards when reductions from other sources (stationary, area, and other mobile sources) are not sufficient. Taxicab regulations that provide incentives for emerging clean-engine technologies can be an important part of these efforts.

Beyond this local need for local solutions, EPCA was enacted to "decrease dependence on foreign imports, enhance national security, achieve the efficient utilization of scarce resources, and guarantee the availability of domestic energy supplies at prices consumers can afford." S. Rep. No. 94-516, at 117, *reprinted in* 1975 U.S.C.C.A.N. 1956, 1957. Yet our enormous dependence on automobiles and the energy that fuels them makes it unlikely that we can achieve these goals through federal performance standards alone. Social and economic change in how our cities and towns transport goods and people is also necessary. Because modern American cities require extreme amounts of energy to keep running and they have long had to balance market forces with socially beneficial outcomes, they are the ideal level of government to test, refine, and inspire energy policies that may ultimately meet EPCA's goals. It is difficult to predict what social and economic changes will be most transformative or whether such change on a

national level is even possible, but one thing is clear – we are all poorer when we do not allow our cities to innovate and explore solutions without cost or risk to the country, and only the possibility of gain.

Many local governments are only too happy to be one of Justice Brandeis's laboratories of innovation on this and other intractable problems. In fact, there is a sense of fraternity and friendly rivalry among many American cities. We pay attention to each other's successes not only to replicate them, but also to out-do them. We also pay attention to each other's setbacks to avoid having similar problems. Several national organizations, of which three are *amici* here, facilitate the exchange of information about what works, what does not work, and what can be improved on. But decisions like that of the court below can chill even the most zealous experimenter. This is especially true in tough economic times, when there is particular reluctance to pursue innovative policies with heightened litigation risks. Besides New York City, Boston, Dallas, and King County have also been sued for their clean-vehicle taxi regulations. And on November 19, 2010, the Minneapolis City Council unanimously passed the following resolution:

> [T]he City of Minneapolis, in response to the rulings in the *City of New York* case and related litigation throughout the country, has halted the enforcement of its

> taxicab fuel efficiency ordinance requirements found in Minneapolis Code of Ordinance (M.C.O.) § 341.300, originally adopted in 2006, and has been unable to pursue new regulations aimed at incentivizing the utilization of fuel efficient and environmentally sustainable taxicabs[.]

Resolution 2010R-570, *available at* http://www.ci.minneapolis.mn.us/council/archives/proceedings/2010/20101119-proceedings.pdf. Similarly, Seattle passed an ordinance in 2008 authorizing rules mandating vehicle size, fuel-efficiency, and emissions requirements for new taxicabs, but has not adopted such rules in light of the rulings in this case.

Of course in our federal system, if preemption is warranted based upon a close reading of the relevant statute and applicable precedents, then that is the proper result. But, by the same token, preemption by a judicial decision that is untethered to the statutory language and heedless of this Court's careful limitations on "related to" preemption is inappropriate. Moreover, it is a loss not only to the government involved, but to other cities that cannot replicate, fine-tune, or improve upon the original innovation; and it stifles other programs that might similarly be thought to run afoul of the statute.

The decision below threatens to do just that. The holding is so broad that local governments are hesitant to adopt clean-vehicle incentive programs with any relation, however incidental, to fuel economy. That disabling decision should not stand. At a minimum, before it becomes law, it should be reviewed by this Court.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
BENNA RUTH SOLOMON*
Deputy Corporation Counsel
DIANE M. PEZANOSKI
Deputy Corporation Counsel
MYRIAM ZRECZNY KASPER
Chief Assistant Corporation
Counsel
GRAHAM G. MCCAHAN
Assistant Corporation Counsel
30 N. LaSalle St., Suite 800
Chicago, IL 60602
(312) 744-7764
benna.solomon@cityofchicago.org

Counsel of Record

December 9, 2010

Supreme Court, U.S.
FILED
DEC 9 - 2010
OFFICE OF THE CLERK

No. 10-618

IN THE

Supreme Court of the United States

CITY OF NEW YORK, *et al.*,

Petitioners,

v.

METROPOLITAN TAXICAB BOARD OF TRADE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PETITIONERS

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amicus Curiae

December 2010

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a national consumer-advocacy organization founded in 1971, appears on behalf of its approximately 225,000 members and supporters before Congress, administrative agencies, and courts on a wide range of issues and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents the interests of its members in litigation and regularly files amicus curiae briefs in cases in the United States Supreme Court and the federal appellate courts.

Among Public Citizen's particular concerns is overbroad invocation of preemption arguments to override state and local laws that seek to protect consumers, workers, and the public—including laws aimed at promoting safer, cleaner, and more economical automobiles. In many instances, as in this case, such preemption arguments reflect distortions of the policies and purposes of federal law that create a false impression of conflict between federal and state law. Often, the result of judicial acceptance of such overly broad preemption arguments would be the creation of regulatory gaps never intended by Congress, as states and local governments would be disabled from addressing problems that the federal government has

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[1] Counsel of record for the parties received timely notice of amicus curiae's intent to file this brief as required by this Court's Rule 37.2(a). Written consents to the filing of the brief from all parties have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief.

neither addressed itself nor intended to prevent the states from addressing. In some cases, including this one, the effect of preemption would be to prevent states and localities from taking actions that federal law and policy affirmatively encourage.

In addition, Public Citizen has a longstanding interest in promoting efficient use of energy and discouraging excessive consumption of gasoline and other fossil fuels, which contributes to depletion of (and higher consumer prices for) scarce natural resources and is directly linked to unhealthy levels of air pollution and the discharge of greenhouse gases. The decision of the court of appeals in this case runs counter to the broad societal interest in energy conservation and, more specifically, to the shared interest of both the federal government and state and local governments in providing incentives, through means other than prescriptive regulations, for the adoption of fuel-efficient vehicles.

REASONS FOR GRANTING THE WRIT

The City of New York, like other local governments, has long regulated taxicab service. For many years, the City had policies that encouraged and even required some cab companies to purchase cars that were relatively inefficient in their consumption of fuel. More recently, the City altered its regulations regarding lease arrangements between taxicab fleet owners and taxicab drivers to eliminate disincentives to the purchase of more efficient hybrid vehicles by fleet owners, and thus to encourage the eventual replacement of fuel-inefficient taxis by modern vehicles that use less gasoline and cause less pollution. The City acted, however, not by imposing *standards* requiring that taxicabs meet specified levels of fuel effi-

ciency, but by creating economic incentives for the purchase of hybrids.

Nonetheless, the U.S. Court of Appeals for the Second Circuit held that the City's lease rules were preempted by the Energy Policy and Conservation Act ("EPCA"), which authorizes the federal government to issue regulations requiring vehicles sold in the United States to meet mandatory average fuel economy standards and provides that a state or local government "may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter." 49 U.S.C. § 32919(a). The Second Circuit reasoned that because New York's lease rules related to the "fuel economy" of New York's taxicabs, they were preempted. *See* 615 F.3d at 157-58.

By holding that any state or local law broadly related to "fuel economy" has the prohibited relationship to "fuel economy *standards*," the Second Circuit, took precisely the broad and simplistic approach to preemption that this Court has repeatedly warned against in its decisions construing similar preemption provisions, particularly ERISA's preemption clause. The result, as the United States put it in its amicus curiae brief supporting the City in the Second Circuit, is one that "it is plain that Congress did not intend." Brief for the United States as Amicus Curiae 2, *Metro. Taxicab Bd. of Trade v. City of New York*, No. 09-2901-CV (2d Cir. filed Jan. 15, 2010) ("U.S. Br."). Indeed, the Second Circuit's reasoning would broadly disable state and local governments from taking actions to create incentives for the purchase of fuel-efficient vehicles, a result Congress could not possibly

have intended and that, as the City has pointed out, itself conflicts with federal policies promoting hybrids and other fuel-efficient cars. The conflict between the Second Circuit's preemption analysis and that dictated by this Court's precedents, together with the broad potential impact of the court's reasoning, strongly counsels in favor of a grant of certiorari in this case.

I. The Second Circuit's Broad Conception of "Relatedness" Is Directly Contrary to This Court's Preemption Jurisprudence and Disregards Critical Statutory Language.

The court of appeals treated the preemption question in this case as one that required only a rote application of what the court apparently saw as clear statutory language. According to the Second Circuit, the words "related to" in EPCA's preemption clause cover all circumstances where "the challenged law contains a 'reference' to the preempted subject matter or makes the existence of the preempted subject matter 'essential to the law's operation.'" 615 F.3d at 156 (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 324-25 (1997)). Because New York's taxicab lease rules affect *fuel economy*, the court went on to hold, they necessarily refer to or depend on the existence of fuel economy *standards*.

Such a broad construction of "related to" is directly contrary to this Court's repeated warnings, in the context of ERISA, that preemption provisions based on the "relatedness" of the subjects of federal and state law cannot be given such sweeping effect. Despite its early recognition of the "expansive sweep" of the ERISA provision preempting state laws that "re-

late to any employee benefit plan," 29 U.S.C. § 1144(a), *e.g.*, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987), this Court has emphasized that the very expansiveness of the concept of "relatedness" is a source of ambiguity and a reason to exercise caution in construing the scope of preemption. As the Court explained in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course ...." 514 U.S. 645, 655 (1995).

Thus, this Court has emphasized that the "relate to" preemption language used in ERISA (and also in EPCA) cannot be approached with "uncritical literalism." *Id.* at 656; *accord Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001); *Dillingham*, 519 U.S. at 325. Instead, the Court has repeatedly begun its analysis of the scope of ERISA preemption with the admonition that "the starting presumption that Congress does not intend to supplant state law" applies. *Travelers*, 514 U.S. at 654; *accord Rush Prudential HMO v. Moran*, 536 U.S. 355, 365 (2002); *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 (1997). And because of the indeterminacy of the statutory language, the search for the requisite clear and manifest congressional intention to supplant state law requires consideration of both "the objectives of the [federal] statute" and "the nature of the effect of state law" on the preempted subject-matter. *Dillingham*, 519 U.S. at 325 (citations omitted).

Here, the Second Circuit overlooked the surest indication of the objective of the federal statute: the law's own language. EPCA's preemption clause does

not, as the Second Circuit's reasoning suggests, apply generally to any state or local law that relates to *fuel economy*, but much more specifically to laws that are related to "*fuel economy standards or average fuel economy standards*." 49 U.S.C. § 32919(a) (emphasis added). Critically, by making preemption turn on relatedness not simply to the broad subject of "fuel economy," but to "fuel economy standards," Congress used terms of art explicitly defined in the statute: EPCA's definition section provides that "'average fuel economy standard' means a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year." *Id.* § 32901(a)(6).

Congress's deliberate use of this defined term in establishing the scope of EPCA preemption makes clear that the policy it was pursuing was not broad preemption of anything relating to fuel economy. Congress had a narrower objective: protection of exclusive federal authority to establish performance standards specifying minimum fuel economy levels that automobile manufacturers must meet. Only laws that relate to such standards are preempted by EPCA.

When the focus is properly placed on whether a state or local law relates to a fuel economy *standard*, the magnitude of the Second Circuit's deviation from this Court's admonition that courts exercise caution in construing preemption clauses based on "relatedness" becomes apparent. Although the City's taxicab leasing regulations may "relate to" fuel economy, they are not themselves mandatory performance standards requiring manufacturers to achieve minimum levels of fuel economy, they do not refer to such mandatory performance standards, and mandatory performance

standards are not somehow essential to the operation of the City's rules. Indeed, the differential lease rates adopted by the City have nothing to do with such standards save that they both in some sense concern fuel efficiency. The City's rules merely affect the incentives of taxicab fleets to make voluntary purchases from among the broad range of vehicles available in the marketplace (all of which presumably satisfy applicable federal fuel efficiency standards).

This Court acknowledged the substantial difference between laws that create voluntary incentive programs and laws that are (or relate to) *standards* in *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246 (2004). There, the Court emphasized that the term "standard" encompasses "[a] command, accompanied by sanctions" determining the characteristics of vehicles that may permissibly be purchased or sold on the market. *Id.* at 255. Put another way, the Court identified "standards" with "criteria" with which vehicles *must* comply. *Id.* at 253. The Court disclaimed any holding that the statute at issue there (which preempted state or local enforcement of vehicle emission "standards" different from federal standards) would preempt "voluntary incentive programs." *Id.* at 258. Such programs, the Court stressed, "are significantly different from command-and-control regulation." *Id.*

Here, unlike in *South Coast*, the statute at issue actually provides an express definition of the key term on which preemption hinges—"average fuel economy standard"—and that definition underscores the distinction recognized in *South Coast* between mandatory standards and incentive programs. By ignoring the express statutory language indicating the narrowness

of the scope of preemption and instead embarking on the open-ended project of determining whether the City's rules "related to" fuel economy generally, the Second Circuit strayed far from this Court's command that in construing the scope of "relatedness" preemption clauses, courts avoid taking the statutory language to the "furthest stretch of its indeterminacy," *Travelers*, 514 U.S. at 655, and instead hold a state law preempted only when the state law runs contrary to Congress's manifest objectives. *Dillingham*, 519 U.S. at 325.

The proper analysis of EPCA's preemptive scope is exemplified by the decision in *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007), addressing whether California emissions standards, which had effects on fuel economy as well, were preempted by EPCA. Consistent with the presumption against preemption and EPCA's language and objectives, the court determined that "EPCA's express preemption of state regulations *related to* mileage standards [should] be construed as narrowly as the plain language of the law permits," and that it encompassed "state regulations that are explicitly aimed at the establishment of fuel economy standards, or that are the *de facto* equivalent of mileage regulation." *Id.* at 1175.[2] Similarly, in *Green Alliance Taxi Cab Ass'n v. King County*, 2010 WL 2643369 (W.D. Wash. June 29, 2010), the court held that a program

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[2] The court also mentioned a third category of preempted regulations, not relevant here: emissions regulations that affect mileage and "that do not meet the requirements established by the Clean Air Act for waiver of preemption under [42 U.S.C. § 7543]." *Id.*

providing voluntary incentives for the purchase of hybrid vehicles by taxicab companies was not preempted because "only a mandate can be a legal regulation 'related to' fuel economy standards and thus preempted by EPCA." *Id.* at *5. The Second Circuit's decision, by contrast, cannot be squared with the preemption principles set forth in this Court's opinions or with the language of EPCA.

II. The Far-Reaching Effects of the Second Circuit's Decision Do Not Reflect Any Recognizable Federal Policy and, Indeed, Conflict With Federal Policy.

The Second Circuit's view that EPCA preempts any state or local law that affects, or reflects any concern regarding, automobile fuel economy, has remarkably broad implications. Most directly, the court's reasoning would threaten preemption of any economic regulation of the City's taxicab industry that seeks to promote energy conservation and combat air pollution by providing incentives for the purchase of hybrid or other fuel-efficient vehicles by taxicab fleets.

As the United States pointed out below, the effect of preemption in this case is to disable the City even from *removing disincentives* to hybrid vehicle purchases that are the result of the City's preexisting lease-rate regulations. Those rules effectively placed all the fuel costs attributable to the purchase of less-efficient vehicles on taxicab drivers and thus encouraged fleet owners to purchase cars that are less expensive to buy but more expensive to operate because of their relatively low gas mileage. *See* U.S. Br. 2-3. As the brief of the United States stated, "The City should not be held to have violated federal law when it

sought to modify the consequences of its earlier regulations." *Id.* at 3.

Moreover, as the United States also observed below, any economic regulation of taxicab lease rates will inevitably have some impact on fleet fuel economy, whether positive or negative. If, as the Second Circuit's reasoning suggests, any such effect has a prohibited "relation" to fuel economy standards, it is not clear what the City can permissibly do in this area (short of dismantling its entire regulatory scheme). But as the United States' brief pointed out, there is absolutely no indication that Congress ever would have intended EPCA's prohibition on meddling by states and localities with *fuel economy standards* to have such a far-reaching effect on *economic regulation of the taxicab industry*, a matter traditionally of local concern:

> Although Congressional intent cannot be determined with certainty in other settings, it is plain that Congress did not intend—by establishing regulation of average fuel economy standards and new motor vehicle emission standards—to assert general federal control over the regulation of taxi services, an area that had been the subject of pervasive local regulation for decades prior to passage of the Clean Air Act and EPCA in the 1960s and 1970s. New York City taxicab regulations have long restricted vehicle choices and equipment, with a consequent impact on the overall fuel economy and emissions of taxi fleets. And the City has also long regulated the economic relationship between taxicab fleet owners and drivers. It has never been suggested that Congress meant to preempt all such vehicle restric-

> tions and lease rate setting, and there is no clear basis for concluding that the regulations at issue in this case at issue crossed a line established by federal law.

U.S. Br. 2.

Moreover, the potential effects of the Second Circuit's decision are by no means limited to its unwarranted interference with taxicab regulation. The court's view that states and localities are preempted from taking actions that have the effect or objective of encouraging the purchase of fuel-efficient vehicles or that otherwise affect the overall fuel economy of the mix of vehicles that buyers purchase cannot logically be confined to regulation of taxicabs. After all, EPCA's preemption clause applies to laws related to fuel economy standards "*for automobiles*," not just taxicabs. 49 U.S.C. § 32919(a) (emphasis added). The Second Circuit's reasoning thus extends to any state or local law that affects fuel economy by creating incentives for the purchase of more fuel-efficient vehicles by consumers or businesses of any kind.

As the petition for certiorari explains, there are literally hundreds of state and local laws that provide such incentives. Pet. for Cert. 24-28. The federal government itself promotes such state and local efforts not only through legislation that specifically encourages them (*see id.* at 21-23), but also by, among other things, providing a comprehensive list of those incentives to allow consumers to take maximum advantage of their benefits. *See* www.afdc.energy.gov/afdc/laws/. It is nothing short of fanciful to suggest that such state and local laws interfere with EPCA's policies or fall within the scope of its preemption clause, but that

is the necessary implication of the Second Circuit's decision.

Energy conservation and combating the environmental effects of fossil-fuel consumption are critical national priorities. Increasing the use of fuel-efficient vehicles is an essential step in pursuing those priorities. Federal fuel economy standards are one means of decreasing gasoline consumption, limiting our reliance on foreign energy sources of increasingly uncertain reliability, and reducing air pollution and greenhouse gas emissions. *See* 75 Fed. Reg. 25324, 25326-27 (May 7, 2010) (establishing new corporate average fuel economy standards). Equally important, however, is encouraging vehicle buyers to select fuel-efficient vehicles from within the "range of vehicle choices" (*id.* at 25324) permitted by those standards. State and local efforts to provide such encouragement—such as the lease rules at issue in this case—complement the objectives of the federal standards without conflicting with them, referring to them or relying on them in any prohibited way, or, indeed, affecting the federal *standards* at all.

Tellingly, the federal government argued below that the City's rules and similar state and local laws do not in any way conflict with federal law or policy and that preempting such laws simply because they have an effect on fuel economy would "create a regulatory void that Congress surely did not contemplate." U.S. Br. 12. Nonetheless, the Second Circuit issued a decision that, in the guise of a wooden application of statutory language aimed at vindicating the supremacy of federal law, poses a potentially devastating threat to vital national interests in addition to interfering with the exercise of traditional powers of state

and local governments. The far-reaching negative effects of the Second Circuit's decision, together with the opinion's disregard of the teaching of this Court's decisions limiting the effect of preemption clauses using the same language at issue here, fully justify review of this important case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae

December 2010